TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 199

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, AND WILBUR ERSKINE, PETITIONERS,

vs.

HARRY W. VOSS, AS TRUSTEE OF THE ESTATE OF WILBUR ERSKINE, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1924

CERTIORARI GRANTED MARCH 2, 1925

(30,685)

(30,685)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 199

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, AND WILBUR ERSKINE, PETITIONERS,

vs.

HARRY W. VOSS, AS TRUSTEE OF THE ESTATE OF WILBUR ERSKINE, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Proceedings in the United States circuit court of appeals, seventh circuit	*a*
Caption	*a*
Notice of petition to review	*a*
Order on petition to review and revise	*b*
Petition to review and revise	*b*
Exhibit A—Stipulation re statement of facts	4
Exhibit B—Agreement between Wilbur Erskine, Harold Taylor, and Harry W. Voss, June 24, 1922	10
Report of referee in bankrutcy	11
Exhibit C—Certificate of referee in bankruptcy	13
Exhibit D—Order of district court approving findings of referee	14
Appearances of counsel	15
Motion to dismiss petition to review and revise	17
Petition to complete record	21
Additional record from district court	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1925

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States courtroom, in the city of Chicago, in said Seventh Circuit, on the third day of October, 1922, of the October term, in the year of our Lord one thousand nine hundred and twenty-two, and of our Independence the one hundred and forty-seventh

And afterwards, to wit: On the eighteenth day of June, 1923, there was filed in the office of the clerk of this court a certain "Notice of filing of Petition to Review" which said Notice is in the words and figures folowing, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In Bankruptcy. No. 625

In the Matter of WILBUR ERSKINE, BANKRUPT. In the Matter of the Petition of HARRY W. VOSS for Review

To Daniel H. Ortmeyer, attorney for Harold Taylor, trustee under the will of Mary E. Erskine, deceased, and Wilbur Erskine:

You are hereby notified that on the 18th day of June, 1923, at nine o'clock A. M., I will file in the clerk's office of the United States Circuit Court of Appeals for the Seventh Circuit in the city of Chicago, a petition for review in the above entitled cause, a copy of which petition is hereto attached as part of this notice, and I will then ask to have the case docketed and the necessary order made therein to have such a case set down for hearing.

Walker & Walker, Attorneys for Harry W. Voss, Trustee in Bankruptcy of the Estate of Wilbur Erskine.

I hereby accept service of the above notice on this 8th day of June, 1923.

Daniel H. Ortmeyer, Attorney for Harold W. Taylor, Trustee under the Will of Mary E. Erskine, Deceased, and Wilbur Erskine.

Endorsed: Filed June 18, 1923. Edward M. Holloway, Clerk.

And afterwards, to wit: On the same day, *to* eighteenth day of June, 1923, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

Monday, June 18, 1923.

Court met pursuant to adjournment.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Francis E. Baker, Presiding Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

Now this day comes Harry W. Voss, as Trustee of the estate of Wilbur Erskine, Bankrupt, by his counsel, and presents a petition to review and revise an order of the District Court of the United States for the District of Indiana, entered therein on April 24, 1923, In the Matter of Wilbur Erskine, Bankrupt.

It is ordered by the court that the said petition to review and revise be filed, and that the respondents answer said petition with-twenty days (20) from the service of a certified copy of this order.

And afterwards, on the same day, to wit: On the eighteenth day of June, 1923, there was filed in the office of the clerk of this court a certain Petition to Review and Revise, which said Petition is in the words and figures following, to wit:

1 IN THE UNITED STATES CIRCUIT COURT OF APPEALS Filed Ju 1923.

For the Seventh Circuit

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

To the Honorable Judges of the United States Circuit Court of Appeals, For the Seventh Circuit:

The petition of Harry W. Voss, as Trustee of the estate of Wilbur Erskine Bankrupt, respectfully shows unto the court,

First: That on the 20th day of December, 1921, Wilbur Erskine was adjudged a bankrupt in the District Court of the United States for the District of Indiana.

Second: That on the 25th day of February, 1922, Harry W. Voss, your petitioner, was duly appointed Trustee of the estate of said bankrupt, having qualified as such and has since been and is now in the discharge of the duties of said trust.

Third: That at the time of the filing of the petition in bankruptcy, the said Wilbur Erskine was the owner of certain real estate in Vanderburgh County, State of Indiana of the value in excess of more than Twenty Thousand Dollars ($20,000.00).

Fourth: That under the orders of the Bankruptcy Court, said real estate was sold by said Trustee for the sum of Thirty-six Thousand, Eight Hundred Seventy Dollars ($36,870.00).

Fifth: That at the time of said sale, Harold Taylor, Trustee under the will of Mary E. Erskine, former wife of bankrupt, joined in said conveyances so that a complete title to said real estate could be conveyed to the purchaser thereof and the Trustee agreed with said Harold Taylor, Trustee, and Wilbur Erskine that he would pay over to them such portion of the purchase price as might thereafter be ordered by said bankruptcy court.

2 Sixth: That on the 27th day of May, this Trustee filed his verified petition in which he showed that the real estate in said bankrupt estate was of the value of more than twenty thousand dollars ($20,000.00).

Seventh: That at the time of the adjudication of bankruptcy herein, the bankrupt had a wife living, namely Mary E. Erskine who died on the 21st day of March, 1922; that Harold Taylor was named Trustee in the will of the said decedent and became vested with all of the real estate of the said Mary E. Erskine, deceased. That Wilbur Erskine may have acquired an interest in said real estate by the death of Mary E. Erskine, and such being the fact, that Harold Taylor as such Trustee and Wilbur Erskine as surviving widower, claim an interest in said real estate and the said Trustee in said petition, denies that Mary E. Erskine, during her lifetime or that Wilbur Erskine or Harold Taylor, Trustee, subsequently acquired any right, title or interest in the real estate of bankrupt.

Seventh: That on the 26th day of June, 1922, the said Wilbur Erskine and Harold Taylor as Trustee under the will of Mary E. Erskine, deceased, having answered said amended petition and asked that the court fix the interest in said real estate owned by said Mary E. Erskine at the time of her death, an agreed statement of facts was submitted which said agreed statement of facts is attached hereto marked "Exhibit A." That thereafter, on the 14th day of March, 1923, the Referee entered an order upon said petition and answer, a copy of which order is filed herewith and made part hereof marked "Exhibit B."

Your petitioner further shows that thereafter on the 21st day of March, 1923, this Trustee filed his petition for review; that said Referee set out the error complained of and prayed that the Referee forthwith certify to the Judge of the District Court, the question presented, a summary of the evidence relative thereto and the finding and order of the Referee thereon, whereupon said Referee certified to said Judge the question presented and a summary of the
3 evidence relative thereto, the finding and the order thereon, a copy of which order of the Referee is filed herewith as part hereof marked "Exhibit C."

Your petitioner further shows that thereafter, on the 24th day of April, 1923, the judge of said District Court in reviewing the findings and orders of the referee on said questions, entered an order sustaining the order of the Referee, a copy of which order is filed herewith as part hereof marked "Exhibit D."

Your petitioner further shows that the question of law deciding by the District Court and by the order of the

Referee was that under the Bankruptcy Act, and by virtue of the laws of the State of Indiana, a widow of bankrupt who dies before the sale of the real estate of bankrupt, is vested in fee with one-fifth of the real estate of bankrupt, in the event of his real estate being of greater value than Twenty Thousand Dollars ($20,000.00); that the Indiana law of judicial sales which fixes the interest of creditors in the judgment debtors' real estate, is unavailing in bankruptcy. That the inchoate interest in real estate of the wife is greater in bankruptcy than under the State Laws of the State of Indiana.

Your petitioner further shows that he has by the orders of said Referee of said District Court injured thereby and that the error complained of, consists of

First: That the District Court direct the payment of one-fifth of the proceeds of the sales of real estate made by said Trustee to be paid to Harold Taylor as Trustee under the will of Mary E. Erskine, deceased and refused to permit your petitioner to retain the money in his hands resulting from the sales of the real estate of bankrupt.

Second: That Harold Taylor as Trustee under the will of Mary E. Erskine, deceased, was not entitled to any part of the proceeds of the sale of the real estate of bankrupt.

Third: That the District Court provided that one-fifth of the proceeds of the sales of real estate made by said Trustee be paid to Harold Taylor as Trustee under the will of
4 Mary E. Erskine, deceased; that the laws of the State of Indiana in the case of judicial sales would require that but one-fifth of Twenty Thousand Dollars ($20,000.00) be retained for the benefit of the widow.

Your petitioner further shows that under the laws of the State of Indiana, the interest of the wife of any debtor does not vest until after a judicial sale or until after the death of the husband; that there was no judicial sale of the real estate of bankrupt until after the death of Mary E. Erskine, wife of bankrupt; that under and by virtue of the laws of the State of Indiana, the interest of the said wife of Wilbur Erskine depended entirely upon the death of Wilbur Erskine prior to the death of his wife or the sale of his real estate under judicial process; that neither of said events happened before the death of Mary E. Erskine; that therefore, the interest conveyed by said Trustee in bankruptcy, your petitioner, was in fee simple to the real estate of bankrupt.

Your petitioner asks for an early hearing of this matter that the same may be presented upon petition and exhibits filed herewith or if your honor so direct, upon the original pleadings, proofs, evidence and proceedings now on file in the office of the Clerk of the United States District Court where said proceedings were had,

Wherefore, your petitioner prays that an order of the said District Court may be reviewed and revised in matters of law so as to adjudge your petitioner entitled to retain all of the money in his hands resulting from the sales of real estate of bankrupt for his costs herein and all proper and equitable relief.

WALTER WALKER
Attorney for petitioner.

State of Indiana
Vanderburgh County } ss:

Your petitioner, Harry W. Voss, on oath, states that the statements in the foregoing petition are true as he verily believes.

HARRY W. VOSS.

Subscribed and sworn to before me this 8th day of June, 1923.

FORREST M. CONDIT
(Seal) *Notary Public*

My commission expires July 20, 1926.

5 EXHIBIT "A."

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy. #625.

The following stipulations are made by the parties hereto for the purposes of this submission:

1. The said Wilbur Erskine, the bankrupt herein, was on December 20, 1921, duly adjudicated a bankrupt in the United States District Court for the District of Indiana, on

his voluntary petition in bankruptcy filed herein in said Court on December 19, 1921.

2. That at the time of the filing of said petition herein in bankruptcy on December 19, 1921, and at the time said Wilbur Erskine was adjudged a bankrupt on December 20, 1921, he was the owner of the following described real estate, and which was of the then value of more than Thirty Thousand Dollars ($30,000), to-wit:

6 3. That Harry W. Voss, Trustee for said bankrupt herein was duly chosen, named and qualified as such Trustee in these proceedings on the 25th day of February, 1922.

4. That at the time of the filing of petition in bankruptcy herein and of such adjudication in bankruptcy said Wilbur Erskine was a resident and an inhabitant of Vanderburgh County, in the State of Indiana, and had been such resident and inhabitant for many years prior thereto.

5. That at the time of such adjudication in bankruptcy, said bankrupt had a wife living, namely: Mary E. Erskine, sometimes known as Bonnie Erskine, who was also a resident and an inhabitant of said Vanderburgh County, State of Indiana, and who thereafter died testate on March 21, 1922. That said Mary E. Erskine was a first wife, with children, said Wilbur Erskine and Mary E. Erskine having been married at Evansville, Indiana, November 26, 1884, and lived together at said City continuously on down to date of her death.

6. That the last will of said Mary E. Erskine, deceased, was thereafter on or about the 24th day of March, 1922, duly admitted to probate in the Vanderburgh Probate Court of Vanderburgh County, in the State of Indiana, a copy of which will is hereto attached, which shall be taken as a true copy.

7. That said Mary E. Erskine, deceased, was survived by her husband, the answering defendant herein, Wilbur Erskine, with whom she was then living and who is now her widower, and their two children. That said Mary E. Erskine was a first wife.

8. That said bankrupt, Wilbur Erskine, husband of said deceased Mary E. Erskine, was seized in fee simple of said real estate first above described, during his said marriage and continuing down to and including the dates heretofore stated, to-wit: December 19, 1921, the date of the filing of the petition in bankruptcy herein, and December 20, 1921,

7 when he was adjudicated a bankrupt in these proceedings.

9. That said Mary E. Erskine, deceased, had never joined in any conveyance of any of said real estate hereinabove referred to, nor did she join in said Wilbur Erskine petition in bankruptcy herein.

10. That copy of the will of Mary E. Erskine attached hereto and identified as Exhibit A shall be taken as a true copy of said will and the probate thereof may be used upon a submission of the petition herein.

11. That prior to the death of said Mary E. Erskine, deceased, she had not filed any suit for partition or to otherwise have her interest in said real estate of said Wilbur Erskine, the bankrupt herein, set off to her.

12. That prior to the death of said Mary E. Erskine, the Trustee in Bankruptcy had been given and had received offers for the purchase of one or more of the pieces of real estate of said bankrupt, but none of said property had been sold or otherwise disposed of at the time of her death.

13. That all of the files and papers or any of them connected with the bankruptcy may be considered in evidence and may be referred to by either of the parties hereto.

14. That the values of the real estate in question are fixed by the amounts for which sales have been made.

15. That all of said real estate has been sold under stipulation and arrangements made by and between the Trustee in Bankruptcy herein, and said Wilbur Erskine as surviving husband, and Harold Taylor as Trustee under said last will of the decedent.

HARRY W. VOSS
Trustee in Bankruptcy.
WILBUR ERSKINE.
HAROLD TAYLOR,
Trustee under will of Mary E. Erskine, deceased.

DANIEL A. ORTMEYER
Atty. for Petitioners.
WALTER WALKER
Atty. for Respondents.

8 I, Mary E. Erskine, of Vanderburgh County, Indiana, do hereby make and publish this my last will.

1. In event my husband, Wilbur Erskine, survives me, I do hereby, after the payment of my just debts, give, devise and bequeath to Harold Taylor all my estate real and personal of every name, nature and description with full powers of disposition, conveyance and transfer thereof, to have and

to hold to him and his heirs and to his successors in this trust, In Trust for the uses and purposes following, that is to say:

The said Trustee shall take so much of the rents, profits and income of the said trust estate as to him shall seem proper, and at his full discretion and upon his own judgment as to the propriety thereof, pay over from time to time, as he shall see fit, to my said husband and to the other members of my family whether living with or apart from him, for his and their use and support, and for the support, maintenance and education of my grandchild or grandchildren or to the said Wilbur Erskine, to the exclusion of the other members of my family, or to anyone or more of the said members of my family to the exclusion of said Wilbur Erskine, and of any other members of my family, the amounts so as to be paid over as well as the person or persons to whom such payments to be made or may be made being at the full discretion of said Trustee. In event of the payment to any of my children or grandchild or grandchildren of any sum or sums of money out of said trust estate, or the rents, profits and income thereof, the same shall be treated as an advancement thereof out of said estate and in the event of the final settlement and distribution of said estate as hereinafter provided, such advancements shall be taken into consideration.

9 II. Said Trustee is further authorized in his discretion to pay over and deliver to said cestui que trust or to anyone or more of the same to the exclusion of the others, any part of the principal of said trust fund or to convey any of the trust real estate to any one or more of the same but such payments or conveyances, if made to any of my children or grandchild or grandchildren, shall not exceed in amount or value what their share would be at such time if the whole estate were then to be divided as if upon a termination thereof, as hereinafter provided, and the same shall be charged as an advancement out of such trust estate and if the amount of the same shall be equal to what such share would be upon a division of such trust estate at such time, then such child or children shall not be entitled to any further interest therein. And if in the exercise of the authority and discretion vested in said Trustee, he shall transfer and convey all the trust estate at any time in or remaining in his hands to the exclusion of the remaining cestui que trust such

act shall terminate such trust and the remaining cestui que trust shall have no further rights or interests therein.

III. Said Trustee is hereby authorized to make sale at any time in his discretion of any of the trust real estate and to make any changes in the investments of said trust personal estate, and this authority shall extend to the change of investment from real to personal property and from personal to real. And said Trustee shall not be held responsible for mistakes in the management of and dealing with said trust estate.

IV. In event at the end of any year said Trustee shall not have paid out under his authority and discretion the whole of the income of said trust estate, he may at his discretion invest the same as principal or hold the same not exceeding one year for the purposes of the trust, and any part then remaining shall be added to the principal of said trust estate.

V. Upon the death of my husband, provided that my daughter, Mary Louise Erskine, shall then have arrived at the age of thirty years, I direct that the Trust Estate should be closed and the remainder thereof distributed among my children, the child or children of any deceased child to take the share of such deceased child, taking into consideration any advancements made them before such distribution under the Trust herein created, such advancements being chargeable with interest at four per cent. (4%) per annum from their respective dates up to the time of distribution. And in event the advancements cannot be equalized in the distribution of said personal trust estate, then said Trustee in the conveyance to said children or their children in their place, as above provided, of the trust real estate, shall make provision for the complete and final equalization thereof by conveying to the said cestui que trusts in such manner that the several rights of the same may be adjusted upon partition. And in event that either of my children be not then surviving and leaving no child or children surviving, the share of such deceased child shall go to my surviving child; but if any deceased child shall leave any surviving child or children, then the child or children of any deceased child shall stand in place of any deceased child under provision of this will.

VI. Said Trustee shall be entitled to a reasonable compensation for his expenses, services, and responsibilities, and shall have the right and power to appoint proper agent or

agents to assist him in the management of the trust estate, but the exercise of the judgment and discretion of the Trustee in payments or conveyances to the cestui que trusts as herein provided for, and in the final distribution of the estate, shall not be delegated to any person.

VII. In event of the death, resignation or disability of said Harold Taylor, then A. G. Torian is hereby ap-
11 pointed as Trustee in his stead, under the trust herein created, and in event of his death, resignation, declination or disability then Steven W. Cook is appointed as Trustee in his place, and stead.

VIII. In event of the death of my husband before my own, then I devise and bequeath all my estate, real and personal of every kind and description to my children, the child or children of any deceased child to stand in place of the deceased parent, share and share alike.

I hereby appoint A. G. Torian as the executor of this will and direct that as soon as may be after my decease, in event I do not survive my husband, such executor shall deliver to said Trustee all my estate, real and personal, remaining after payment of my just debts, and that hereafter my estate be closed. In event said A. G. Torian for any reason does not qualify as such executor, then I appoint Harold Taylor as such executor.

In witness whereof and to each page of this Will I hereby subscribe my name this 17th day of December, 1921.

(Signed) MARY E. ERSKINE

The foregoing will and each page thereof was signed, declared and acknowledged by the above named testatrix, Mary E. Erskine, to be her last will in our presence and was signed by us as attested witnesses at her request in her presence and in the presence of each other on this 17th day of December, 1921.

(Signed) BRUNHILDE BOETTICHER
CARL F. BOETTICHER.

Probated March 24th, 1922,
A. G. Torian qualified as Executor.

12 EXHIBIT "B."

This Agreement between Wilbur Erskine, Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and Harry W. Voss, Trustee in Bankruptcy of Wilbur Erskine, Witnesseth: that,

Whereas, Harry W. Voss is the duly appointed and qualified Trustee in Bankruptcy of Wilbur Erskine in proceedings pending in the United States District Court for the District of Indiana, and as such is vested with the title to the real estate owned by the said Wilbur Erskine at the time of his bankruptcy; and,

Whereas, a question has arisen as to the title of such real estate, and there is a claim upon the part of said Wilbur Erskine and upon the part of said Harold Taylor as Trustee of Mary E. Erskine, who was in her lifetime, the wife of Wilbur Erskine, that there is an interest in the real estate which at the time of the bankruptcy, belonged to said Wilbur Erskine, either in said Harold Taylor Trustee as such Trustee, or Wilbur Erskine personally as surviving husband; and,

Whereas, the question of such interest and the extent thereof if it exists is now pending and under consideration before the Bankruptcy Court presided over by Charles A. Burnett, Referee in Bankruptcy; and,

Whereas, in the meantime, said Voss as Trustee in Bankruptcy is making efforts to sell said real estate and it is to advantage of all of the parties hereto that said real estate should be sold at the best price obtainable and that a better price would be obtained if the whole title can be conveyed,

13 Now, Therefore, it is agreed that the said Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and the said Wilbur Erskine in his own right as surviving husband, will join with the said Voss as Trustee in bankruptcy in the conveyance of any real estate sold by him, and the said Voss as such Trustee upon his part agrees that he will hold of the amount realized from such sale, an amount being not less than one-fifth of the purchase price to protect whatever rights the said Taylor as Trustee and the said Erskine or either of them, may have in the said real estate and in the event the final decision in the courts is in favor of the said Taylor Trustee or the said Erskine, the said Voss will pay over to the one entitled thereto, the amount found

to be due the said Erskine or said Taylor Trustee on account of the interest claimed by them or either of them in said real estate. The intent of this agreement is to make a complete title to any purchaser and realize the most possible out of the sale of said real estate without prejudice to the rights of any of the parties hereto as to their interests in said real estate.

In Witness Whereof, the above named parties, have hereunto set their hands and seals this 24th day of June, 1922, In triplicate.

(Signed) HARRY W. VOSS,
Trustee
WILBUR ERSKINE
HAROLD TAYLOR,
Trustee under will of Mary E. Erskine, deceased.

14 EXHIBIT "B." Exhibi

Duplicate

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

At Evansville, in said district, on the 14th day of March, 1923. Before Charles A. Burnett, Referee in Bankruptcy.

Harry W. Voss, the trustee herein, having filed, on the 27th day of May, 1922, his verified amended petition herein showing that there is real estate in said bankrupt estate of the value of more than $20000.00, that at the time of the adjudication in bankruptcy herein the bankrupt had a wife living, namely, Mary E. Erskine, who died testate on the 21st day of March, 1922, that Harold Taylor was named trustee in the will of said decedent and is vested with all the real estate that said Wilbur Erskine may have acquired and interest in by the death of said Mary E. Erskine, that said Harold Taylor, as such trustee, and said Wilbur Erskine, as such surviving widower, claim an interest in said real estate, and that

said trustee in bankruptcy denies that said Mary E. Erskine had during her lifetime, or that said Wilbur Erskine or said Harold Taylor, trustee, subsequently have acquired any right, title or interest in said real estate; and on the 26th day of June, 1922, the said Wilbur Erskine and said Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, having answered said amended petition and asked that the court fix the interest in said real estate owned by said Mary E. Erskine at the time of her death; the said Harry W. Voss, the trustee in bankruptcy, appearing herein by Walker & Walker, his attorneys, and the said Wilbur Erskine and Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, appearing by Daniel H. Ortmeyer and Harold Taylor; and at Evansville, in said district, on the 21st day of November, 1922, a hearing having been had upon the issues joined, an agreed statement of facts submitted, and argument of counsel begun but not concluded and such argument having been concluded on the 22nd day of November, 1922, and thereupon it having been agreed that briefs should be filed; and said briefs having been submitted and read and the evidence having been duly considered and the referee being advised in the premises; now, therefore,

It is ordered:

That said trustee in bankruptcy take nothing by his said amended petition and that the same be and it hereby is dismissed.

That said Harold Taylor, as such trustee under the last will of Mary E. Erskine, deceased, is entitled to and that he do have and recover herein an amount equal to one-fifth of the proceeds of the sales of the real estate which have been made by the trustee in bankruptcy herein pursuant to the stipulation and agreement entered into by said Harry W. Voss, tustee in bankruptcy, Wilbur Erskine, as such surviving husband, and Harold Taylor, as said trustee, under which all of the real estate of the bankrupt has been sold and deeds of conveyance made in which all of said parties have joined, the said one-fifth of said proceeds amounting to the sum of $

That said Harry W. Voss, the trustee herein, pay said sum of $ to said Harold Taylor, as trustee under the last will of Mary E. Erskine, deceased, out of the funds in his hands belonging to said bankrupt estate.

CHARLES A. BURNETT
Referee in Bankruptcy.

16 EXHIBIT "C." Exhib

Duplicate

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

To the Honorable Albert B. Anderson, District Judge:

I, Charles A. Burnett, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 14th day of March, 1923.

That, on the 21st day of March, 1923, the trustee in bankruptcy herein, feeling aggrieved thereat, filed a petition for a review of such order, which was granted.

There is no dispute as to the facts involved in the question herewith submitted, and such facts are set out in the briefs of counsel.

The question presented on this review is:

Who takes the wife's inchoate dower interest in the real estate owned by the bankrupt on the date he was adjudged a bankrupt, the wife being then alive, but later dying testate, after the appointment and qualification of the trustee in bankruptcy herein, but before said trustee had sold any of such real estate? In other words, Did Mary E. Erskine, wife of Wilbur Erskine, the bankruut, by virtue of the laws of the State of Indiana, acquire an interest in the real estate owned by said bankrupt at the time of his adjudication in bankruptcy, and had such interest became absolute and vested in her at and prior to her death?

I hand up herewith, for the information of the Judge, the following:

17 (1) Trustee's amended petition.

(2) Answer of Wilbur Erskine and Harold Taylor, trustee.

(3) Trustee's petition for review and assignment of errors, in duplicate.

(4) Trustee's brief on review, in duplicate.

The attorneys for the trustee submit a request for oral argument.

Dated at Lafayette, Indiana, March 21, 1923.

Respectfully submitted,

CHARLES A. BURNETT
Referee in Bankruptcy.

D." 18 EXHIBIT "D."

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy, No. 625

April 24, 1923.

The matter of the petition of Harry W. Voss, Trustee, for a review of the referee's finding herein coming on for a hearing before the court, and the court having examined said petition and being sufficiently advised in the premises, the prayer thereof is now denied and the finding of the referee is approved, to which ruling of the court the trustee at the time excepts.

19 (Endorsed) No. 3298 In the United States Circuit Court of Appeals for the Seventh District In the matter of Wilbur Erskine, Bankrupt. In Bankruptcy No. 625. Petition to Review & Revise. Order of District Court of Indiana. Filed Jun 18 1923 Edward M. Holloway Clerk Walker & Walker Attorneys and Counselors at Law Evansville, Ind.

And afterwards, to wit: On the eighteenth day of June, 1923, in the October term aforesaid, came the Petitioner, by his counsel Messrs. James T. Walker and Henry B. Walker and filed in the office of the clerk of this court their appearances which said appearances are in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1922

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, Petitioner,

vs.

HAROLD TAYLOR, Trustee, etc., et al., Respondents

The clerk will enter *my* appearances as counsel for the petitioner.
James T. Walker, Henry B. Walker, Evansville, Ind.

Endorsed: Filed June 18, 1923. Edward M. Holloway, Clerk.

And afterwards, to wit: on the seventh day of July, 1923, came the Respondents by their counsel Messrs. Harold Taylor, John R. Browne and Daniel H. Ortmeyer and filed in the office of the clerk of this court their appearances, which said appearances are in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1923,

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee in Bankruptcy, Petitioner,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE, Respondents

The clerk will enter my appearance as counsel for the Respondents.

Harold Taylor, John R. Browne, Daniel H. Ortmeyer, 1514 Merchants Bank Buldg., Indianapolis, Indiana.

Endorsed: Filed July 7, 1923. Edward M. Holloway, Clerk.

And afterwards, on the same day, to wit: On the seventh day of July, 1923, there was filed in the office of the clerk of this court a certain "Motion to Dismiss Petition to Review and Revise" which said Motion is in the words and figures following, to wit:

19½ IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Filed J
1923.

For the Seventh Circuit.

No. 3298.

In the Matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

MOTION BY HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, TO DISMISS THE PETITION TO REVIEW AND REVISE IN MATTER OF LAW FILED BY HARRY W. VOSS, TRUSTEE IN BANKRUPTCY.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Comes now, Harold Taylor, Trustee under the Will of Mary E. Erskine, deceased, and hereby respectfully moves the Court to dismiss the petition of Harry W. Voss, Trustee in Bankruptcy, to review and revise in matter of law the order of the United States District Court for the District of Indiana made and entered herein April 24, 1923, affirming an order of March 14, 1923, by Hon. Charles A. Burnett, Referee in Bankruptcy herein, as exhibited by said petition, and to affirm the order of the United States District Court for the District of Indiana, on the following grounds, to wit:

1. That no appeal has been asked for, or granted or taken by the said petitioner from the order of the United States District Court for the District of Indiana, entered on
20 April 24, 1923, and now herein sought to be reviewed and revised, and the time allowed for such an appeal had fully elapsed before the filing of the petition herein.

2. The nature of the proceedings exhibited by said petition is that of a controversy arising in bankruptcy proceedings which may be properly presented to this Court only by way of an appeal or writ of error under Sections 24a and 25 of the Bankruptcy Law and not by petition to review and revise in matter of law under Section 24b.

3. That said petition was not filed herein within a reasonable time after the entry of the order of the United States District Court for the District of Indiana, entered herein, on to-wit: April 24th, 1923, and hereby sought to be reviewed and revised.

4. The petition does not sufficiently or definitely state the matter of law sought to be submitted for review and revision.

5. The petition does not correctly state the matter of law sought to be submitted for review and revision.

6. The question of law sought to be submitted by the petition to review and revise is not fairly or correctly stated in said petition in this:—

(a) It is not stated on page 3 of the petition that Mary E. Erskine, deceased, was alive and living with her husband, said bankrupt, at the date of the filing of the petition, the adjudication and appointment of Trustee in Bankruptcy herein, and that she died subsequent to the adjudication and appointment of Trustee in Bankruptcy herein, as shown by the exhibits attached to such petition.

(b) It was not decided, as shown by the exhibits at-
21 tached to the petition, that the Indiana law of judicial sales is or is not unavailing in bankruptcy, as alleged on page 3 of the petition.

(c) It was not decided, as shown by the exhibits attached to the petition, "that the inchoate interest in real estate of the wife is greater in bankruptcy than under the State laws of the State of Indiana," as alleged on page 3 of the petition.

(d) That the matter of law sought to be revised or reviewed is not stated in the petition, as will appear from the exhibits attached to the petition.

7. The petition does not show wherein the petitioner is injured or prejudiced by the orders he seeks to have this Court review and revise.

8. That the inchoate interest of the decedent, Mary E. Erskine, in and to the real estate of her husband, the bankrupt, became a vested interest in and to said real estate at the date of the adjudication in bankruptcy herein, to-wit: on December 20th, 1921, at which time said decedent was living with her said husband, the bankrupt, as his wife, and thereafter continued to so live with him until the date of her death, to-wit: March 21st, 1922.

9. That, under the Bankruptcy Law and the Statutes of Indiana, the interest of Mary E. Erskine, now deceased, but then the living wife of said bankrupt, in and to the real estate owned by the bankrupt at the date of the adjudication in bankruptcy, did not pass to the trustee in bankruptcy or become a part of the bankrupt's estate but became, immediately, upon such adjudication, vested in said wife as her separate and absolute property and estate.

10. That, by the Bankruptcy Laws and the laws of the State of Indiana, the inchoate interest of Mary E. Erskine in and to the lands of her husband, the bankrupt, became a vested interest on December 20th, 1921, the date of the adjudication in bankruptcy, and was a part of her estate and passed by her will to Harold Taylor, Trustee, at the date of her death, to-wit: March 21, 1922, such interest being a one-fifth interest in the proceeds of the sales of the real estate, and found and adjudged by the Referee in Bankruptcy and approved and affirmed by the United States District Court for the District of Indiana, to be in the sum of $7374.00 and which said sum the Trustee in Bankruptcy was ordered to pay to said Harold Taylor, Trustee under the will of Mary E. Erskine, deceased.

Wherefore, this respondent moves this Court to dismiss the said Petition to Review and Revise the said order of the United States District Court for the District of Indiana, entered April 24, 1923, and to affirm said order, all at petitioner's costs and for all other proper relief.

HAROLD TAYLOR,
JOHN R. BROWNE
DANIEL H. ORTMEYER,
Attorneys for Respondent.

23 State of Indiana } ss:
County of Marion }

HAROLD TAYLOR, on oath says he is respondent to the said Petition to Review and Revise in the above matter, that the facts stated are true, to the best of his knowledge and belief.

HAROLD TAYLOR.

Subscribed and sworn to before me this 6th day of July, 1923.

My commission expires Nov. 25 1926

WALTER J. TINGLE
(Seal) *Notary Public.*

24 (Endorsed) No 3298 U. S. Circuit Court of Appeals Seventh Circuit In Bankruptcy. No. 625 In the Matter of Wilbur Erskine Bankrupt Motion by Respondent Harold Taylor Trustee under will of Mary E. Erskine, deceased, to dismiss Petition of Harry W. Voss Trustee in Bankruptcy to Review and Revise order of U. S. District Court District of Indiana entered April 24, 1923. Filed Jul 7—1923 Edward M. Holloway Clerk Harold Taylor John R Brown 1514 Merchants Bank Bldg Indianapolis, Ind. Daniel H. Ortmeyer Mercantile Bank Bldg Evansville Indiana Attorneys for Respondent

And afterwards, to wit: On the eleventh day of September, 1923, there was filed in the office of the clerk of this court a certain Petition to Complete the Record and Additional Record Attached" which said Petition, etc., is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October Term, A. D. 1922

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt, Petitioner,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE, Respondents

ORIGINAL PETITION TO REVIEW AND REVISE

The undersigned petitioner Harry W. Voss, Trustee in Bankruptcy of the estate of Wilbur Erskine, hereby respectfully moves the court for an order directing the correction of the record in this cause on account of the omission therefrom of the trustee's amended petition as filed with the referee in bankruptcy on the 27th day of May, 1922, and the answer of Wilbur Erskine and of Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, filed on the 25th day of June, 1922, and the trustee's petition for a review and assignment of errors filed by the trustee on the 21st day of March, 1923, certified copies of which documents are hereto attached. The undersigned petitioner believes that said documents may be material to said petition in this appeal and were omitted by accident or error.

He further prays that the Honorable Court upon this suggestion direct that the omission be corrected by the filing of said certified copies, all pursuant to the provisions of Equity Rule No. 76 adopted by the Supreme Court of the United States in its October term 1912, and that said certified copies be made a part of the original petition to review and revise and that said original petition to review and revise be amended so as to contain said documents.

Walker & Walker, Counsel for Petitioner.

ACKNOWLEDGEMENT OF SERVICE

The respondents, Wilbur Erskine and Harold Taylor, Trustee under the will of Mary E. Erskine, Deceased, hereby acknowledge

service of a copy of the foregoing motion this 6th day of September, 1923.

Daniel H. Ortmeyer, Harold Taylor, John R. Browne, Counsel for Respondents, Wilbur Erskine and Harold Taylor, Trustee under the will of Mary E. Erskine, Deceased.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

In Bankruptcy. No. 625

In the Matter of WILBUR ERSKINE, Bankrupt

To the Honorable Charles A. Burnett, referee in bankruptcy:

The undersigned Harry W. Voss, Trustee of the estate of Wilbur Erskine, for his amended petition, respectfully shows to the court that in said estate, there is real estate of the value in excess of Twenty Thousand Dollars ($20,000.00); that at the time of the adjudication in bankruptcy, the said bankrupt, Wilbur Erskine, had a wife living, one Mary E. Erskine, that subsequent to said adjudication, to wit; the 22nd day of December, 1921, the said Mary E. Erskine died testate, that Harold Taylor was named Trustee in said will and is vested with all of the real estate that Wilbur Erskine may have acquired an interest in said real estate by the death of Mary E. Erskine; that the said Harold Taylor as such Trustee and Wilbur Erskine as surviving widower, claim an interest in said real estate; that this Trustee in Bankruptcy denies that the said Mary E. Erskine during her life time or said Wilbur Erskine or Harold Taylor, trustee, has subsequently acquired any right, title or interest in said real estate.

Wherefore: this trustee prays that the said Wilbur Erskine and Harold Taylor, trustee under the will of Mary E. Erskine, deceased, be required to come into this court and set up any right, claim or interest they may have in said real estate and that said interest therein be fixed by this court and that the rights of this trustee in Bankruptcy to sell said real estate, be declared free of any claim of said Harold Taylor, trustee, and Wilbur Erskine, and that he recover his costs.

(Signed) Harry W. Voss, Trustee in Bankruptcy of Wilbur Erskine.

STATE OF INDIANA,
Vanderburgh County, ss:

Harry W. Voss, being sworn, says that he is the Trustee named herein; that the statements contained in the foregoing petition are true.

(Signed) Harry W. Voss.

Subscribed and sworn to before me this 25th day of May, 1922. (Signed) Hattie M. Falk, Notary Public. My com. expires Nov. 7, 1922. (Seal.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

In Bankruptcy. #625

In the Matter of WILBUR ERSKINE, Bankrupt

To the Honorable Charles A. Burnett, referee in bankruptcy:

The undersigned, Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, as such trustee, and Wilbur Erskine, separately and severally, for answer to the amended petition of Harry W. Voss, Trustee in Bankruptcy herein, asking that these answering defendants be required to set up any interest they may have in the real estate owned by Wilbur Erskine at the time of his adjudication in bankruptcy and that such interest therein, if any, be fixed by this court, each for himself shows to the court the following:

That said Wilbur Erskine, who is the bankrupt herein, was adjudicated a bankrupt on December 20, 1921; and that at the time of such adjudication in bankruptcy said Wilbur Erskine was, and for many years prior thereto, has been and still is a resident and an inhabitant of the County of Vanderburgh, State of Indiana; and that at the time of such adjudication in bankruptcy said bankrupt was the owner of the following described real estate situated in the State of Indiana, to wit:

That said above described real estate was at the date of said adjudication of the value of more than Twenty Thousand Dollars ($20,000.00) and that at the time of such adjudication said bankrupt had a wife living namely, Mary E. Erskine, sometimes known as Bonnie Erskine; and that said Mary E. Erskine thereafter on Marh 21, 1922, died testate, a resident and an inhabitant of Vanderburgh County, State of Indiana, and that the last will of said Mary E. Erskine, deceased, was thereafter on or about March —, 1922, duly admitted to probate in the Vanderburgh Probate Court, Vanderburgh County, State of Indiana; and that said Mary E. Erskine, deceased, in and by her last will bequeathed and devised all of her estate, real and personal, to the answering defendant herein Harold Taylor, trustee under the will of said Mary E. Erskine, deceased as trustee; and that said Mary E. Erskine, deceased, was sur-ived by the answering defendant herein, Wilbur Erskine, who was her husband and is now her widower; that said bankrupt was seized in fee simple of said real estate above described during his said marriage and at the time of the adjudication in bankruptcy as aforesaid and in the conveyance of which his said wife did not join in due form of law.

That said Mary E. Erskine, wife of Wilbur Erskine as aforesaid, was living on the date of and at the time of the adjudication of said

Wilbur Erskine as bankrupt, on to wit: December 20, 1921; that upon such adjudication the said Mary E. Erskine became absolutely vested with a wife's interest in and to the real estate then owned by her said husband under and in accordance with the laws of the State of Indiana and the Federal Bankruptcy Act. That said Mary E. Erskine never in any way parted with, sold, transferred, assigned or released or in any other way, directly or indirectly, sold, gave up, surrendered, released, transferred or assigned such interest, and that she owned, and was entitled to such interest at the time of her death, on to wit: March 21, 1922, and that said Mary E.Erskine, deceased, at the time of her death, had an interest in said real estate by virtue of her said marriage.

These answering defendants claim that said Mary E. Erskine, deceased, at the time of her said death had an interest in all of the real estate owned by said Wilbur Erskine, the bankrupt herein, at the time of said adjudication in bankruptcy, and that said interest in said real estate of said Mary E. Erskine, deceased, became absolute and vested in her at and upon the adjudication of said bankruptcy and prior to her said death, and that these answering defendants are the owners, or one of them is the owner, of said interest in said real estate owned by said Mary E. Erskine, deceased, at the time of her said death.

Wherefore: these answering defendants pray that the court fix the interest in said real estate owned by said May E. Erskine, deceased, at the time of her said death, and for all other proper relief.

(Signed) Wilbur Erskine. Harold Taylor, as Trustee under the Will of Mary E. Erskine, Deceased. Harold Taylor, Daniel H. Ortmeyer, Attorneys for Defendants.

Subscribed and sworn to before me, the undersigned, by the said Harold Taylor on this 24th day of June, 1922. (Signed) Daniel H. Ortmeyer, Notary Public. My commission expires October 22, 1925. (Seal.)

In the District Court of the United States for the District of Indiana

In Bankruptcy. No. 625

In the Matter of Wilbur Erskine, Bankrupt

To the Honorable Charles A. Burnett, referee in bankruptcy:

Your petitioner respectfully shows:

First. That your petitioner is the trustee in bankruptcy of the estate of the above named bankrupt.

Second. That on the 14th day of March, 1923, an order, a copy of which is hereto annexed, was made and entered herein;

Third. That such order was erroneous in that:

(A) One-fifth (1/5) of the proceeds of sales of real estate made by said trustee were ordered to be paid to Harold Taylor as Trustee under the will of Mary E. Erskine;

(B) That such order was erroneous and contrary to law in that Harold Taylor as such trustee was not entitled to any part of the proceeds.

C. That said order was erroneous for the reason that the amount directed to be paid to the said Harold Taylor, trustee, was too large:

D. That said order was contrary to law;

E. That said order is not in accord with the laws and statutes of the State of Indiana.

F. That said order is contrary to the evidence.

Wherefore: Your petitioner feeling aggrieved because of such order prays that the same may be reviewed as provided by bankruptcy law of 1898 and General Order XXVII.

Dated at Evansville, Indiana, this — day of March, 1923.

(Signed) Harry W. Voss, Trustee in Bankruptcy of the estate of Wilbur Erskine, Bankrupt.

STATE OF INDIANA,
County of Vanderburgh, ss:

Harry W. Voss, being sworn upon his oath says that he is trustee in bankruptcy of the foregoing estate; that the statements of fact contained in the foregoing petition are true according to the best of his knowledge, information and belief.

(Signed) Harry W. Voss.

Subscribed and sworn to before me this 15th day of March, 1923. (Signed) Charlotte Kerth, Notary Public. My commission expires December 31, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

In Bankruptcy. No. 625

In the Matter of WILBUR ERSKINE, Bankrupt

At Evansville, in said District, on the 14th day of March, 1923. Before Charles A. Burnett, Referee in Bankruptcy

Harry W. Voss, as Trustee herein, having filed on the 27th day of May, 1922, his verified amended petition herein showing that there is real estate in said bankrupt estate of the value of more than $20,-

000.00, that at the time of the adjudication in bankruptcy herein the bankrupt had a wife living, namely Mary E. Erskine, who died testate on the 21st day of March, 1922, that Harold Taylor was named trustee in the will of said decedent and is vested with all of the real estate that said Wilbur Erskine may have acquired and interest in by the death of said Mary Erskine, that said Harold Taylor, as such trustee, and said Wilbur Erskine, as such surviving widower, claim an interest in said real estate, and that said trustee in bankruptcy denies that said Mary E. Erskine, during her lifetime, or that said Wilbur Erskine or said Harold Taylor, trustee, subsequently have acquired any right, title or interest in said real estate; and on the twenty-sixth day of June, 1922, the said Wilbur Erskine, and said Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, having answered said amended petition and asked that the court fix the interest in said real estate owned by said Mary E. Erskine at the time of her death, the said Harry W. Voss, the trustee in bankruptcy, appearing herein by Walker & Walker, his attorneys, and the said Wilbur Erskine, and Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, appearing by Daniel H. Ortmeyer and Harold Taylor; and at Evansville in said district, on the 21st day of November, 1922, a hearing having been had upon the issues joined, an agreed statement of facts submitted, and argument of counsel begun but not concluded and such argument having been concluded on the 22nd day of November, 1922, and thereupon it having been agreed that briefs should be filed; and said briefs having been submitted and read and the evidence having been duly considered and the referee being advised in the premises, now therefore:

It is ordered:

That said trustee in bankruptcy take nothing by his said amended petition and that the same be and it is hereby dismissed.

That said Harold Taylor as such trustee under the last will of Mary E. Erskine, deceased, is entitled to and that he do have and recover herein an amount equal to one-fifth of the proceeds of the sales of the real estate which have been made by the trustee in bankruptcy herein pursuant to the stipulation and agreement entered into by said Harry W. Voss trustee in bankruptcy, Wilbur Erskine, as such surviving husband and Harold Taylor as said trustee, under which all of the real estate of the bankrupt has been sold and deeds of conveyance made in which all of said parties have joined, the said one-fifth of said proceeds amounting to the sum of $7,374.00.

That said Harry W. Voss, the trustee herein, pay said sum of $7,374.00 to said Harold Taylor, as trustee under the last will of Mary E. Erskine, deceased, out of the funds in his hands belonging to said bankrupt estate.

—— ——, Referee in Bankruptcy.

William Kappas, Clerk of the District Court of the United States for the District of Indiana hereby certifies that the foregoing are full and true complete copies of the trustee's amended petition filed in Cause number 625, In the matter of Wilbur Erskine, bankrupt,

on the twenty-seventh day of May, 1922, with Charles A. Burnett referee in bankruptcy, also the answer of Wilbur Erskine and Harold Taylor filed on the 26th day of June, 1922, with Charles A. Burnett referee in bankruptcy, also petition for review and assignment of errors of Harry W. Voss, trustee in bankruptcy of the estate of Wilbur Erskine, filed on the twenty-first day of March, 1923, with Charles A. Burnett, referee in Bankruptcy.

Witness my hand and the seal of said court at Evansville, this 7th day of Sept., 1923.

William P. Kappes, Clerk of the District Court of the United States for the District of Indiana, by C. E. Harman, Deputy. (Seal.)

Endorsed: Filed September 11, 1923. Edward M. Holloway, Clerk.

And afterwards, on the same day, to wit: On the eleventh day of September, 1923, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

Tuesday, September 11, 1923.

Court met pursuant to adjournment.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Evan A. Evans, Circuit Judge

3298

In the Matter of Wilbur Erskine, Bankrupt

Harry W. Voss, as Trustee of the Estate of Wilbur Erskine, Bankrupt,

vs.

Harold Taylor, Trustee under the Will of Mary E. Erskine, Deceased, and Wilbur Erskine

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

On motion of counsel for petitioner, it is now here ordered that the following certified copies of certain parts of the record in this cause be filed and made a part of the petition to review and revise heretofore filed in this court, subject to the objection of the respondents:

(1) Trustee's Amended Petition, filed in Cause No. 625, In the Matter of Wilbur Erskine, Bankrupt, on May 27, 1922, with Charles A. Burnett, Referee in Bankruptcy.

(2) Answer of Wilbur Erskine and Harold Taylor, filed June 26, 1922, with Charles A. Burnett, Referee in Bankruptcy.

(3) Petition for Review and Assignment of Errors of Harry W. Voss, Trustee in Bankruptcy of the estate of Wilbur Erskine, filed March 21, 1923, with Charles A. Burnett, Referee in Bankruptcy.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United Staes court-room, in the city of Chicago, in said Seventh Circuit, on the second day of October, 1923, of the October term, in the year of our Lord one thousand nine hundred and twenty-three, and of our Independence the one hundred and forty-eighth.

And afterwards, to wit: On the second day of January, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Wednesday, January 2, 1924.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk; Robert R. Levy, Marshal.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, etc.,

vs.

HAROLD TAYLOR, Trustee, et al., etc.

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

It is now here ordered that this cause be, and the same is hereby set down for hearing Tuesday, January 8, 1924

And afterwards, to wit: On the eighth day of January, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Tuesday, January 8, 1924.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk; Robert R. Levy, Marshal.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, etc.,

vs.

HAROLD TAYLOR, Trustee, etc., et al.

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

Now this day come the parties by their counsel and this cause now comes on to be heard on the petition to review and revise an order of the District Court of the United States for the District of Indiana, the answer thereto, the briefs of counsel and on oral arguments by Mr. Henry B. Walker, counsel for petitioner and by Mr. Harold Taylor, counsel for respondents, and the court having heard the same takes this matter under advisement.

And afterwards, to wit: On the twentieth day of June, 1924, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1923, JANUARY SESSION, 1924

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt, Petitioner,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE, Respondents

Original Petition to Review and Revise an Order of United States District Court for the District of Indiana

Before Alschuler, Evans, and Page, Circuit Judges

OPINION BY PAGE, CIR. J.

Wilbur Erskine, on December 20, 1921, when adjudicated a bankrupt, was a resident of the state of Indiana, and was married to his first wife, who died March 21, 1922, survived by her husband and two children.

Before the filing of the petition and adjudication, bankrupt owned, in fee simple, a considerable amount of real estate. His wife left a last will and testament, naming respondent Taylor trustee thereunder. Petitioner Voss was elected trustee of the bankrupt estate.

After the death of the wife, who had never joined in any conveyance, the real estate was sold, by stipulation between petitioner, respondent and bankrupt, all parties joining in the deeds.

The rights of respondent, as trustee under the will, were, by agreement of all of the parties, submitted to the court in bankruptcy, and its holding was favorable to the claim of respondent and bankrupt that, upon the filing of the petition and the adjudication in bankruptcy, the wife became vested with the same rights in the estate of the bankrupt that she would have had thereunder had she survived her husband.

This case is brought here by petition to review and revise, and a motion is made to dismiss on the ground that the case should have been brought here by appeal.

In support of his contention that this case is properly before this court on a petition to review and revise, petitioner's main reliance is upon Coder v. Arts, 213 U. S. 223. Because of the difference between the facts in that case and the case at bar, it is inapplicable here to support petitioner's contention. In that case a creditor filed his claim, and it was allowed in bankruptcy. In connection therewith, and as a part thereof, he asked for priority, and the court held that

the claim for priority was merely incident to the allowance of the claim. In the case at bar, respondent is not a creditor and is not seeking the allowance of a claim, as such. The sole thing that respondent and bankrupt are seeking to do is to have carved out and set aside to them, as their property, free from administration in bankruptcy, a very considerable portion of the property which would otherwise be administered in bankruptcy and distributed to creditors.

This court in In re Breyer Printing Co. 216 Fed. 878, pointed out so clearly the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings" that it will serve no good purpose to add to what was there said. We there also discussed Coder v. Arts, supra, and other leading cases wherein there is pointed out the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings."

It seems clear, under the facts in the instant case, that the question here involved is one

"between the * * * trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants" (respondents) "on the other, concerning property in the possession of the * * * trustee * * * to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors."

This is the language of In re Breyer Printing Co., supra.

Counsel for petitioner rely upon In re Petronio, 220 Fed. 269, in which we held that the proceeding in the district court was of a summary nature, citing In re Goldstein, 216 Fed. 887, 889, and In re Breyer Printing Co., supra. In the Goldstein Case, after distinguishing between summary and plenary methods of procedure, we said:

"The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. * A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

That was a petition to review and revise, which raised only the question of the jurisdiction of the court to enter any order other than one of dismissal, after it was ascertained that there was a claim to property that was not merely colorable. The Petronio Case is of like character. There the District Court, in the face of the fact that its jurisdiction was disputed, and the further fact that a substantial and not a colorable claim was set up, proceeded to adjudicate the matter in a summary way, and therefore both the Petronio and Goldstein Cases were reviews of summary orders in bankruptcy.

The other authorities cited by petitioner are in harmony with the authorities here cited.

The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the parties could not affect the method of procedure to procure a review.

For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an act of September 6, 1916, (39 U. S. Stats. at L. p. 727; Sec. 1649a U. S. Compiled Stats. 1916:

"That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, supra, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms "appeal" and "writ of error" should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, especially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal.

Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana judicial sales act of 1875 (Secs. 3052 and 3055, page 178, Burns, 1914), but asserts,

"That the rights and interests of his decedent" (Mary E. Erskine) "in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the state of Indiana, being Sections 3014, 3029, 3037 and 2864, Burns' 1914," (being, respectively, Secs. 17, 27 and 35 of Act of 1852, regulating descents, and Sec. 122 of the Decedents' Estates Act of 1881, for the settlement and distribution of estates).*

*"17. If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value

What respondent's argument means by a vesting upon adjudication by operation of law seems to be based upon three things: (a) That under Section 75-a-5 of the Bankruptcy Act, the inchoate right of dower of the wife does not pass to the trustee; (b) That upon adjudication "So far as the bankrupt's property was concerned, after the adjudication, he was, as it were, civiliter mortuus. His rights in the property were the same as though he were dead."; (c) That, by reason of a and b, there was vested absolutely in the constructive widow all of the rights that she would have had as actual widow of a deceased husband.

In Bank v. Sherman and Hickling v. Sherman, 101 U. S. 403, relied upon in support of proposition b, dower rights were not involved, but the court, commenting upon the effect of filing petition in bankruptcy, said:

"The filing of the petition was a caveat to all the world. * * * Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. * * * If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, civiliter mortuus."

We think that what was said in Re Dayton Coal & Iron Co. 291 Fed. 390, as to a part of the above quotations is reasonably applicable to all of it. The statement, "The bankrupt became, as it were, for many purposes, civiliter mortuus," we think is used more as an illustration than as a judicial determination, and certainly should not be held to have any influence on the determination of the issue in this case. In Platner v. Sherwood, 6 Johnson's Chancery Reports (N. Y.), 118, 123, it is said:

---

ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth, as against creditors."

"27. A surviving wife is entitled, except as in section 17 (Sec. 2483) excepted, to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions."

"35. No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

"122. If the decedent leave a widow, and the real estate owned by him at his death shall not exceed ten thousand dollars in value, the court shall direct the sale of the undivided two-thirds parts thereof for the payment of said debts and liabilities; and if the value thereof exceed ten thousand dollars, and do not exceed twenty thousand dollars, the court shall order the sale of the undivided three-fourths thereof; and, if it exceed in value twenty thousand dollars, the undivided four-fifths thereof, for said purpose."

a May be conceded.

"But the civil death spoken of in the books, is of two kinds: 1. Where there is a total extinction of the civil rights and relations of the party, so that he can neither take nor hold property, and his heirs succeed to his estate in the same manner as if he were really dead, or the estate is forfeited to the crown; 2. Whre there is an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate to the crown. Of the first kind, are the cases of monks professed, and abjuration of the realm; all the other cases are of the second kind. Strictly speaking, there are but two cases of civil death; those of a monk professed, and an abjuration of the realm."

The bankrupt here was not in either class. One against whom a petition in bankruptcy has been filed, and against whom adjudication has been had, is not under any disability of any kind or character, except that his right to deal with the property owned at the time of the filing of the petition is in some ways restricted. He is under no civil disability whatever. Even as to his property that passes to the trustee by operation of law upon adjudication as of the time of filing the petition he still may deal with it in certain ways. He has the power either before or after adjudication to contract with his creditors for a composition, (Nassau Smelting & Refining Works v. Brightwood Bronze Foundry Co. — U. S. —, opinion filed May 26, 1924), and such dealing is a matter of common and almost daily practice. In all cases, upon confirmation of composition, either before or after adjudication, the property that passes by operation of law to his trustee, again, by operation of law, passes from the trustee to him. (Sec. 70f Bankruptcy Act.) In most states, a bankrupt has exemptions, sometimes returnable to him in personal property, sometimes out of the real estate as a homestead. If a bankrupt is in any sense civiliter mortuus, he is not so in any such sense as would contribute or give effect to any section of the Indiana statute cited. Counsel say that cases construing Section 70a have uniformly held that the title of the trustee vests as of the date of adjudication, and that the wife's inchoate interests vest in her at the same time. No cases are cited. A wife's inchoate rights vest upon marriage or when the property is acquired after marriage. Unless there is some provision of some Indiana statute that operates to change the widow's inchoate right and increase it to a present fixed right, upon adjudication against the husband in bankruptcy, then there is not at the time of the vesting of the husband's estate in the trustee any change whatever in the wife's rights. The purpose of Section 70a is not to affect or change the wife's interest. Quite the contrary is true. It simply leaves a wife's interest where it finds it. In Porter v. Lazear, 109 U. S. 84, 86, the court cites English authorities, and says:

"By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him."

In Davis v. Kelly, decided by the Supreme Court of Indiana, February 2, 1912, and reported in 97 N. E. at page 336, discussing Section 3062 Burns Ann. Statute, a section of the judicial sales act of 1875, said (p. 337):

"A proper construction of the act of 1875, as applied to the facts of the present case, requires the determination of the law prior to its passage. Under the statutes of 1852, a wife's inchoate interest in the real estate of her husband might become absolute in two ways: (1) Where a husband dies seized of real estate, the widow took by descent, as her husband's heir, under section 17 of the statute of descents, being section 2483 R. S. 1881 (Sec. 3014, Burns 1908). (2) Where the husband's title was divested during coverture the wife not joining in any conveyance, the wife took, upon surviving her husband, not by descent, but by virtue of her marital rights, under section 27 of the statute of descents, being section 3029 Burns 1908 (Section 2491, R. S. 1881). * * *

"It is evident that, when a husband's land was sold at judicial sale prior to the taking effect of said act of 1875, and the husband subsequently died, leaving his wife surviving him, the wife took title in fee simple, not by descent, but by virtue of her marital rights under said section 27" (Section 3029 Burns). * * * Prior to that time, where a husband's land was sold at judicial sale, the inchoate interest of the wife did not become absolute until the husband died, leaving the wife surviving him. During the husband's lifetime the entire title, together with the right of possession, was vested in the purchaser at the judicial sale. If the wife died during the husband's lifetime, her inchoate right was defeated altogether, and the title of the purchaser at the judicial sale became absolute. The purpose of the act of 1875 was to alter these rules of law by providing that the wife's interest should become absolute without reference to her survivorship of her husband. (Citing cases.) The evident purpose of said act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in cases of judicial sales. To this extent and for this purpose the previous law was changed. * * * As the inchoate interest of the wife in the land of her husband in the conveyance of which she did not join vested in her and became absolute on the death of her husband prior to the taking effect of said act of 1875, under said section 27 of the statute of descents * * * it follows that under said act of 1875 the inchoate interest of the wife in her husband's land sold at judicial sale vests and becomes absolute under said section 27, supra, upon the consummation of such sale."

It seems clear from this decision that in so far as the Indiana statutes are here involved, the Indiana law, except as changed by the act of 1875, under which respondent here is claiming no rights, is exactly as it was prior to said act. Sections 27 and 17, referred to in the above case, are Sections 3029 and 3014 Burns, respectively, here relied on by respondent. Section 27 has reference to the rights of a "surviving wife." Section 17 disposes of the interests of the wife "if a husband die testate or intestate." There is nothing in any of

the four sections, 3037, 3029, 3014 *or* 2864, that in the remotest degree discloses any intent on any account to hasten or advance the time when the inchoate rights of the wife shall become absolute.

A very diligent search of the Indiana authorities has failed to reveal to us any case in which the courts of Indiana have held that the wife's inchoate interest has been advanced so as to become absolute prior to the husband's death, unless such cases have been based and bottomed upon the act of 1875. Lawson v. De Bolt, 78 Ind. 563; Wright v. Gelvin, 85 Ind. 128; Chase v. Van Meter, 140 Ind. 321. And the same search has revealed to us many cases in which the Supreme Court of Indiana has held that the interest of the wife is conditional, depending upon her survivorship. Fry v. Hare, 166 Ind. 415, 420.

We are of opinion that on the death of the widow all her right in this property was extinguished, and that no interest in the property passed to Taylor, her trustee.

The order of the District Court should be, and it hereby is, reversed, and the cause remanded for further proceedings in conformity herewith.

A true copy: Teste: —— ——, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, on the same day, to wit: On the twentieth day of June, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Friday, June 20, 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. Evan A. Evans, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

This cause came on to be heard on the petition to review and revise an order of the District Court of the United States for the

District of Indiana, entered therein on April 24, 1923, and the answer thereto and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the said order of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be remanded to the said District Court for further proceedings in conformity with the opinion of this court.

And afterwards, to wit: On the third day of July, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Thursday, July 3, 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, etc.,

vs.

HAROLD TAYLOR, Trustee, etc.

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

On motion of Mr. Harold Taylor, counsel for respondent it is now here ordered that the time for filing a petition for a rehearing in this cause be, and the same is hereby extended fifteen (15) days from the time allowed by the rules of this court.

And afterwards, to wit: On the thirty-first day of July, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Thursday, July 31 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 3298
October Term, A. D. 1923.

IN THE MATTER OF WILBUR ERSKINE, BANKRUPT.

HARRY W. VOSS, AS TRUSTEE OF THE ESTATE OF WILBUR ERSKINE, BANKRUPT, *Petitioner*, *v.* HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, AND WILBUR ERSKINE, *Respondents.*	Original Petition to Review and Revise an Order of the United States District Court for the District of Indiana.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

The undersigned, your petitioners, respectfully submit that each of them has been aggrieved by an opinion of your

Honors rendered herein on the 20th day of June, 1924, in the respects hereinafter set forth and each prays for a rehearing of said matter upon the following grounds:

1. It is respectfully urged that Section 4 of the Act of September 6, 1916, (39 U. S. Statutes at large, at page 727; Section 1649a, U. S. Compiled Statutes 1916), cannot properly be extended by judicial construction to include statutory proceedings known as "petitions to review and revise in matter of law" provided for in the Bankruptcy Act, and which procedure is made applicable only to bankruptcy proceedings, and not to controversies arising in bankruptcy proceedings.

2. It is respectfully urged that Section 4 of the Act of September 6, 1916, (39 U. S. Statutes at large at page 727; Section 1649a U. S. Compiled Statutes 1916) is only intended to be corrective as to mistakes made in the two procedures named under the general Judicial Code; between (a) Writs of error, which is the procedure to be followed in obtaining appellate review in law suits; and (b) Appeal, which is the procedure provided for obtaining appellate review in equity proceedings. That this statute is plainly due to the influence of Code pleading in Code States as to the general law and equity practice, and the tendency to drop the distinctive forms of procedure in the Code States. But that said Section 4 can have no application to Special Statutory proceedings provided for special purposes and procedures, such as the Petition to Review and Revise under 24b of the Bankruptcy Act and known only to Bankruptcy proceedings, and confined strictly to the proceedings and not applicable to controversies arising in bankruptcy such

as is here involved and reviewable only by appeal under 24a of the Bankruptcy Act.

In Federal procedure concerning appeals in equity, there is no statutory provision analagous to the Petition to Review and Revise—Section 24b of the Bankruptcy Act. So held by this Court *in Re Parker*, 283 Fed. 404, 406, decided December 28, 1921. Therefore it is respectfully submitted that it would be against the established rules of construction to extend and broaden the language and scope of Section 4 to include within its terms and meaning this special statutory proceeding of 24b of the Bankruptcy Act; That the Court erred in giving by its construction such meaning to said Section 4 to include Petitions to Review and Revise under Section 24b.

3. It is further respectfully urged that the Court erred in holding that the petition to review and revise should not be dismissed because of the provision of Section 4 of Act of September 6, 1916, (39 U. S. Statutes at large at page 727; Section 1649a, U. S. Compiled Statutes 1916.)

4. The Court in its original opinion herein states the following:

> "Controversies arising in bankruptcy are lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms 'appeal' and 'writ of error' should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived *especially where, as here, the record before us is in all respects the same as it would be on appeal.* We shall consider the matter as here on appeal."

It is respectfully urged that the Court is in error in the statement that "the record before us is in all respects the same as it would be on appeal." In an appeal there would be an order of this court or of the District Court allowing the appeal and a certified copy of the complete record of the District Court, certified to by the Clerk of that court. In the case at bar there is no such order of either court and no such certified copy of the record. This case came to this court on an original petition to review and revise, filed June 18, 1923, and the only paper that was filed in this court was the original petition to review and revise with accompanying exhibits. That original petition to revise is not a record on appeal as required by law. It is merely petitioner's petition to review and revise. Respondents promptly, on July 7, 1923, moved to dismiss said original petition to review and revise on the ground, among others, that no appeal had been asked for or granted or taken. And in ample time for them to have taken an appeal and filed a record on appeal. On September 11, 1923, petitioner filed in this court his petition to complete the record and this court made the following order:

> "On motion of counsel for petitioner, it is now ordered that the following certified copies of certain parts of the record in this cause be filed and made a part of the petition to review and revise heretofore filed in this Court, subject to the objection of the respondents:
>
> "1. Trustee's amended petition filed in cause No. 625 in the matter of Wilbur Erskine, Bankrupt, on May 27, 1922, Charles A. Burnett, Referee in Bankruptcy.
>
> "2. Answer of Wilbur Erskine and Harold Taylor, Trustee, filed June 26, 1922, with Charles A. Burnett, Referee in Bankruptcy.

"3. Petition for review and assignment of errors of Harry W. Voss, Trustee in Bankruptcy of the Estate of Wilbur Erskine, filed March 21, 1923, with Charles A. Burnett, Referee in Bankruptcy."

After the filing of those additional papers on September 11, 1923, there was no record on appeal on file in this court. The only papers on file in this court in this cause then and now consist of an original petition to review and revise, with the exhibits thereto attached, including the parts of the record attempted to be filed and made a part of the petition to review and revise by the order of September 11, 1923. The filing in this court of an original petition to review and revise is not the filing of a record on appeal. It is a petition by petitioners and is not a record in the sense that the term record is used when we speak of filing a record on appeal. If respondents are correct in this then this court never had and has not now jurisdiction of this cause.

6. It is respectfully urged that the court is in error in the statement in its opinion that "Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana Judicial Sales Act of 1875." It is true that counsel for respondents sought by argument in the original brief herein to support the judgment of the District Court, which judgment gave a greater interest to respondents than that given by the Judicial Sales Act of 1875, but by seeking to support the judgment of the District Court they did not intend to forego or waive any right that either respondent has under the law, and it is suggested that the respondents ought to be given whatever rights the law gives them. The attention of the court is called to

the statement on page 12 of respondents' original brief herein as follows:

> "There is no question in the minds of counsel that if the Judicial Sales Act of 1875 was to be held as here applying, then the interest of the wife would be one-fourth of $20,000.00 or $5,000.00, and that it would be subject to the further section of the same Act providing that the husband would inherit."

The foregoing statement was intended as a recognition by counsel that it was for the court to say whether or not the Judicial Sales Act applied and, if it does apply, save that right for respondents.

If the Judicial Sales Act applied the interest in the real estate vested in the wife upon the adjudication, passed to her husband by descent upon her death by virtue of that statute, if no effect is to be given to her last will.

Haggerty v. Byrne, 75 Ind. 499, 503;
Hurst v. Mann, 51 Ind. App. 466;
Davis v. Kelley, 179 Ind. 13.

However, in the case at bar the wife devised all of her real estate to respondent Taylor, Trustee, so that her interest in the real estate, if the Judicial Sales Act does apply, belongs to respondent Taylor, Trustee, by virtue of her will.

Bradley v. Thixton, 117 Ind. 255.

By Statutes of Indiana, the wife has an absolute right to dispose of by will all her property, real and personal, to any person or corporation capable of taking same.

Sections 3112-3113 Burns' Rev. Stat. 1914.

By an act of 1907, (Sec. 3046 Burns R. S. 1914,) where a wife leaves a will which makes any provision for the husband, the husband takes under the will, and takes nothing from his wife's estate by reason of any law of descent of the State of Indiana, unless he make election to retain his rights under the law. To elect to take under the law he must record his written election in Clerk's office where will is probated. The right of election is a purely personal one. No one else can exercise it nor can it be controlled by others. There is no claim here that the husband, respondent, made any such election, and we assume there will be no question made as to the wife's will controlling. This we understand to be the effect of the statement found in the original brief in support of the original petition herein as appears in the petitioner's third proposition submitted to the court, at page 11, Brief for Petitioner, only questioning the amount of the recovery.

7. It is respectfully urged that if this Honorable Court has understood that the respondent, Taylor, Trustee, "repudiates the suggestion of petitioner that he claims any title under the Judicial Sales Act of 1875," meaning that said respondent was refusing to take under said statute in the event the Court were of the opinion and should decide that said statute controlled the title of said respondent's decedent, then there has been a misunderstanding as to the position of respondents in this matter affecting said decision, and that therefore the court did not consider the effect of the Judicial Sales Act of 1875, then there was and is a misunderstanding of these respondents' position which seriously injured their rights herein, and would leave this case without a proper determination. Respondent's position

has been all along that the general statutes providing dower interest in the husband's real estate controls the interest of respondent's decedent in this matter and which vested in her under section 70a of the Federal Bankruptcy Act and the Decisions construing the same, and counsel have urged such contention, believing they were justified in that position under the law, but never with any thought of any disclaimer or that it was not a question that was before the court to decide.

It is further respectfully urged that, even if the court is of the opinion that Respondent, Taylor, Trustee, has repudiated any claim under the Judicial Sales Act, justice requires that the court determine what right, if any, the respondents have under that act, for it cannot be that the court will fail to preserve any rights that parties may have because of language used in a brief when it is apparent that the parties are seeking to have determined whatever rights they may have.

8. It is further respectfully urged that for the court to hold in effect that because there is a right of composition the title does not vest as of date of adjudication regardless of whether the composition is or is not effected, is erroneous and contrary to the express language of the statute and the constructions placed thereon by the Supreme Court and Courts of Appeal of the United States. The right of composition which may be exercised after adjudication would be no more than a condition subsequent which if it does not happen, has no effect upon the previous title duly obtained. It would not be possible for the law to be effective and indulge in uncertainties as to titles of real estate. The Federal Bankruptcy Act contemplates an entire separation of

the titles of husband and wife, as of date of adjudication. It gives no power to the trustee to take the wife's dower interest. It leaves it to her and makes it to vest in her as of that date. Whether this is to be treated or spoken of as though there was a civil death or just the meaning and effect of the Bankruptcy Act, would make no difference; the result is the same. In Indiana the wife's inchoate interest is an absolute fee, the old common law dower having been abolished. And the title vests accordingly as of the date of adjudication. There is no claim made and certainly the decision of the United States Supreme Court in *Porter v. Lazear* would prevent such claim that a purchaser at a bankruptcy sale takes the wife's inchoate interest commonly spoken of as her one-third (1-3) dower interest with right of possession. It is not contended that such purchaser takes it subsequently. The policy of the Bankrupt law would forbid such a rule. The trustee takes the property for the benefit of the creditors, not for the benefit of the purchaser. If a purchaser was buying, subject to a possibility of obtaining the dower interest in the future, there would be small probability of its increasing the price in the trust fund, so that it would be punishment to the bankrupt, his creditors, and his family and benefit only the purchaser. But as a matter of fact, no one takes the wife's dower interest through the trustee in bankruptcy without consent of the wife. It must go by some act of the wife by way of joining in the conveyance or giving consent to the sale and to the conveyance by the trustee. This must be done either by herself or her authorized representative and this is the only way in which her interest is to be divested or conveyed. Is this requirement without meaning? If it has meaning, as

tinguished. In the face of the foregoing policy of the law it is submitted that that result is so obviously unfair as to shock the conscience. At the time of the oral argument in the District Court the learned judge of that court stated that that result would be unfair, for to take from the heirs or devisees of this wife because of her death, the death having occurred after the adjudication, that which she would have had if she had lived is to give to the creditors that which they were not entitled to on the date of the adjudication and to take from the wife or her family that which she was entitled on the date of the adjudication.

Wherefore, upon the foregoing grounds, these respondents and petitioners do respectfully pray this Honorable Court that a re-hearing may be granted of said cause and that the mandate of this court may be stayed pending the disposition of this petition.

Respectfully submitted,

HAROLD TAYLOR, Trustee, under the will of Mary E. Erskine, deceased, and Wilbur Erskine.
Respondents-Petitioners.

By
DANIEL H. ORTMEYER,
HAROLD TAYLOR,
Their Attorneys.

I, Harold Taylor, of counsel for respondents and an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Seventh Circuit, do certify

that in my opinion, the foregoing petition for re-hearing in the matter of Wilbur Erskine, Bankrupt, Harry W. Voss, as Trustee of the estate of Wilbur Erskine, Bankrupt, Petitioner, against Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and Wilbur Erskine, No. 3298, is well founded and is not presented for the purpose of creating a delay.

HAROLD TAYLOR.

Subscribed and sworn to before me, a Notary Public, in and for Marion County in the State of Indiana, this 4th day of August, 1924.

My commission expires Nov. 25, 1926.

(Notarial Seal)

WALTER J. TINGLE,
Notary Public.

And afterwards, to wit: On the fifteenth day of August, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Friday, August 15, 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt,

vs.

HAROLD W. TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 56, inclusive, contain a true and complete transcript of the record in the United States Circuit Court of Appeals for the Seventh Circuit in the matter of Wilbur Erskine, bankrupt; Harry W. Voss, Trustee of the estate of Wilbur Erskine, Bankrupt, vs. Harold Taylor, Trustee under the will of Mary E. Erskine, Deceased, and Wilbur Erskine, No. 3298, October Term, 1923, as the same remains on the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Eighteenth day of September, A. D. 1924.

Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal of the United States Circuit Court of Appeals, Seventh Circuit.)

IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed March 2, 1925

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Seventh Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

Office Supreme Co
FILED
NOV 10 1
WM. R. STA

No. [redacted] 199

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, WILBUR ERSKINE,

Petitioners,

v.

HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

HAROLD TAYLOR,
DANIEL H. ORTMEYER,
Counsel for Petitioners.

E. A. HARDIN PRINT, INDIANAPOLIS

INDEX.

	Page
Petition for Writ of Certiorari	1
Brief Statement of Matter Involved	3
General Reasons Relied on for Allowance of Writ	8
Brief in Support of Petition	15
Improper Procedure	15-24
Wife's Interest	24

CASES CITED.

Hardin, Gdn., Am. Tr. Co., Trustee, 67 Ind. App.	10, 24, 29
Matter of Loving, 224 U. S. 183	19, 21
Duryea Power Co. v. Sternburgh, 218 U. S. 299	19, 21
Gauzen v. Compania Gen., etc., 245 U. S. 86	21
McBride v. Mullinex, 299 Fed. 162	22
In re Smith-Flynn C., etc., Co., 229 Fed. 465	22
In re Becker, 285 Fed. 706	22, 23
In re Jones, 294 Fed. 832	23
In re Interborough Consol. Corp., 283 Fed. 334	23
Liberty Nat'l Bank v. Bear, 44 Sup. Ct. Rep. 499 (Advance sheets, July 1, 1924.)	23
Section 70a (5) Bankruptcy Act	24
Porter v. Lazier, 109 U. S. 84	24
In re Hays (6th Cir.), 181 Fed. 674, 676	24
Marine Nat'l Bank v. Swigert (6th Cir.), 262 Fed. 254	24
Thomas v. Woods (8th Cir.), 173 Fed. 585	24
Indiana Statutes, Wife's Interest	25, 26
Cumberland Glass Co. v. DeWitte, 237 U. S. 447	25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, WILBUR ERSKINE,
Petitioners,
v.
HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,
Respondent.
No. ———.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and Wilbur Erskine, respectfully petition this court for a writ of certiorari to require that there be certified to this court for review and determination the cause lately pending in the Circuit Court of Appeals for the Seventh Circuit, entitled Original Petition to Review and Revise. In the Matter of Wilbur Er-

skine, Bankrupt. *Harry W. Voss, Trustee of the Estate of Wilbur Erskine, Bankrupt, Petitioner, v. Harold Taylor, Trustee Under the Will of Mary E. Erskine, deceased, and Wilbur Erskine, Respondents,* wherein said trustee in bankruptcy was petitioner and said Taylor, trustee, under the will of Mary E. Erskine, and said Wilbur Erskine, were respondents.

The finding and decree of the Circuit Court of Appeals denied your petitioner's motion to dismiss the petition to review, and reversed the District Court upon the petition to review, holding that under Sec. 4 of an Act of September 6, 1916, (39 U. S. Stats. at L., p. 727; Sec. 1649a U. S. Compiled Stats. 1916), the petition to review should not be dismissed as improperly brought, but should be retained and treated as an appeal. No appeal or writ of error had been taken or asked for.

This is a controversy arising in bankruptcy, involving the right to the inchoate interest of the wife of the bankrupt in the real estate owned by him at the time he was adjudged a bankrupt or the proceeds thereof, and where the final decision of the Circuit Court of Appeals in reversing the District Court holds that the title to such inchoate interest does not vest in the wife, living, at the date of adjudication, but that whatever rights she took she lost by her death, which occurred subsequent to the adjudication and the appointment and qualification of the trustee in bankruptcy. The amount in controversy exceeds $2,000.00 and the determination of the questions involved, both as to procedure and as to the rejection of the wife's right to her inchoate interest, claimed by her trustee under her will, or if not to said trustee then to the surviving husband as after-acquired property, is essential to the uniform construction

and administration of the bankruptcy act throughout the United States.

BRIEF STATEMENT OF THE MATTER INVOLVED.

Mary E. Erskine, petitioners' decedent, was the wife of said Wilbur Erskine, bankrupt. She was alive and living with her said husband at the time of the filing of the petition in bankruptcy and the adjudication and the appointment and qualification of the respondent, Harry W. Voss as trustee in bankruptcy of said Wilbur Erskine. The wife was not a party to the petition in bankruptcy and never assigned or conveyed in any way her rights to her inchoate interest in the real estate owned by her husband at the time of the bankruptcy.

Said Mary E. Erskine died testate on March 21, 1921, subsequent to the date of the appointment and qualification of the said Voss as trustee in bankruptcy of said Wilbur Erskine, bankrupt. By her will she left all her estate, real and personal, in trust to said Taylor, trustee.

The chronology of these events is important.

On December 20, 1920, said Wilbur Erskine was adjudged a bankrupt in the United States District Court for the District of Indiana.

February 25, 1921, the respondent, Harry W. Voss, trustee in bankruptcy, was duly elected and qualified as the trustee in bankruptcy of said Wilbur Erskine, bankrupt, and entered upon his duties as such trustee, and still is such trustee in bankruptcy.

On all of the dates mentioned said bankrupt, Wilbur Erskine, was the owner of real estate in Vanderburgh County, Indiana, of a value in excess of $30,000.00.

On all of the said dates said Wilbur Erskine was a married man, his wife living with him in Evansville, Indiana, where they had lived for many years.

it must, for we do not believe the law requires idle things, then what is that interest, this dower interest of the wife? Who owns it and where does it go?

9. The court in its opinion says:

> "There is nothing in any of the four sections, 3037, 3029, 3014 and 2804, that in the remotest degree discloses any intent on any account to hasten or advance the time when the inchoate rights of the wife shall become absolute."

It is respectfully urged that it is the force and effect of the adjudication of bankruptcy and of the Bankruptcy Act that *advances the time* when the inchoate rights of the wife shall become absolute, and not the Indiana Statutes. The Bankruptcy Act controls from date of adjudication, and takes only the husband-bankrupt's portion and vests title to his portion in his trustee upon the adjudication, leaving the wife's portion to vest in her. It is respondent's contention that the Indiana Statutes simply provide the measure of this inchoate dower interest. Respondents urge that the opinion of the court does not give effect to the Bankruptcy Act, particularly Section 70a, as it has been construed by the courts of the United States as well as the decision of the Indiana Appellate Court in *Harlin, Gdn. vs. American Trust Co., Trustee in Bankruptcy*, 67 Ind. App. 213.

10. It is respectfully urged that this court has overlooked the decision in the case of *Harlin, Gdn. v. American Trust Company, Trustee*, 67 Ind. App. 213, cited on page ten (10) of respondents' original brief herein, in which case it is held that upon the adjudication in bankruptcy the inchoate interest of the bankrupt's wife becomes absolute and

entitled her to partition. That decision has never been overruled or questioned and states the law of Indiana. And if the inchoate interest becomes absolute upon the adjudication in bankruptcy the subsequent death of the wife will not diminish her rights or enlarge those of the Trustee in Bankruptcy.

It is further respectfully urged that this is in keeping with the rule laid down by the Supreme Court of the United States in construing the Bankruptcy Act, holding in effect that a subsequent death of a party does not affect the title of the Trustee nor the property to which he is entitled to administer as part of the bankrupt's estate to be devoted to the extinction of his debts, and holding that the Trustee takes title as of date of adjudication but only to such property as it was—as it stood at the time of the filing of the petition.

Everett, Trustee in Bankruptcy of Judson v. Judson, 228 U. S. 474.

11. It is respectfully urged that the court has overlooked the fact that it is not only the purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors, but it is the purpose of the law as well to give the bankrupt and his family a fresh start with such exemptions and rights as the statute left untouched and that the act should be construed in the light of that policy.

Burlingham v. Crouse, 228 U. S. 459, 473.

This Honorable Court in its opinion holds that on the death of the widow all her right in this property was ex-

On March 21, 1921, some time after the date of the appointment and qualification of said respondent Voss as trustee in bankruptcy for said Wilbur Erskine, bankrupt, said Mary E. Erskine died, testate. Her last will was duly probated March 26, 1921, and by its provisions left her entire estate, real and personal, in trust to said Taylor, trustee, under her said last will. (Rec., pp. 6-9.) Her said husband, Wilbur Erskine, bankrupt, also surviving her at that time. Question was made as to whether the wife's inchoate interest in the husband's real estate owned at date of adjudication had become vested in her at said date of adjudication or before her death, and if so, did it pass to the trustee under the will, or to the surviving husband.

On May 27, 1922, said Voss, trustee in bankruptcy, filed with the referee in bankruptcy an amended petition alleging the dispute as to title making said Taylor, as trustee under the will of deceased wife, and said Wilbur Erskine, as surviving husband, parties thereto denying they had any interest and asking that they be required to come into the bankruptcy court and set up any claim or right they had in said real estate, and that his rights as trustee in bankruptcy be declared free of any claim of said Taylor, as trustee, or said Wilbur Erskine. (Tr., pp. 22-23.)

On June 24, 1922, a written agreement was entered into between said Voss, trustee in bankruptcy, said Taylor, trustee under the will, and said Erskine, surviving husband, providing that the parties should appear to the amended petition of the trustee in bankruptcy then pending before the referee in bankruptcy, and, that to facilitate and advantage the sale of the real estate as a whole, all parties would join in deeds of conveyance, and that the trustee in bankruptcy would retain not less than one-fifth of the pro-

ceeds of the sales in his hands to await the final decision of the courts as to who would be entitled to the said moneys as representing the inchoate interest of the wife, and without prejudice to the rights of any of the parties. (Tr., pp. 10-11.)

Thereafter, on June 26, 1922, and agreeable to the agreement just referred to, your petitioners, said Taylor, trustee under the will, and said Erskine, surviving husband, voluntarily appeared in the bankruptcy court to said amend petition of respondent, and filed their answers to said petition. (Tr., pp. 23-25.)

For purposes of submitting the controversy to the bankruptcy court, all the parties, Harry W. Voss, as trustee in bankruptcy, Wilbur Erskine, surviving husband, and Harold Taylor, trustee under the will of Mary E. Erskine, deceased, joined in certain stipulations setting up the important facts and dates thereof as to the adjudication, appointment and qualification of the trustee; the ownership of real estate; that the bankrupt was married and his wife living with him at the date of the filing of the petition; date of adjudication, and date of appointment and qualification of the trustee; that she had died testate thereafter on March 21, 1921; that the bankrupt and his wife had been residents of Vanderburgh county for many years prior to the date named; that the wife had never joined in any conveyance of said real estate, nor did she join in the petition in bankruptcy; that she had died testate, and attaching a copy of the will to be used upon the submission; that she had not filed any suit for petition or to otherwise have her interest in her real estate of her bankrupt husband set off to her prior to her death; that all the files and papers, or any of them connected with the bankruptcy might be considered in evidence

and referred to by either of the parties, and that all the property had been sold under stipulations and agreements between the parties. (Tr., pp. 5-6.)

On March 14, 1923, the referee in bankruptcy made his finding and rendered judgment in favor of your petitioner, said Taylor, trustee under the will of Mary E. Erskine, deceased, in the sum of $7,374.00, and ordered the trustee to pay to the trustee under the will, that sum, representing one-fifth of the proceeds of the sale of the real estate sold by the trustee in bankruptcy, pursuant to the agreement already referred to. (Tr., pp. 11-12.)

Said Voss, trustee in bankruptcy, filed with the referee in bankruptcy his petition to review and revise the order of the referee, to review, which petition the referee certified to the District Court. (Tr., pp. 14-15.)

On April 24, 1923, the District Court denied the petition to review and approved the findings and order of the referee in bankruptcy. (Tr., p. 15.)

No appeal or writ of error was asked, allowed or taken from the said order of the District Court of April 24, 1923; but, on June 18, 1923, said Voss, Trustee in Bankruptcy, filed in the United States Circuit Court of Appeals for the Seventh Circuit, his original petition to review and revise the said order of the District Court in matters of law, so as to adjudge said trustee in bankruptcy "entitled to retain all the moneys in his hands resulting from the sales of real estate of bankrupt", and making your petitioners, respondents to said petition, etc. (Tr., pp. 1-4.) No transcript of the record in the District Court was filed with or made part of said petition to review. Copies of certain papers were attached as Exhibits to it.

On July 7, 1923, your petitioner, said Taylor, as trustee under the will of deceased wife, filed motion to dismiss said petition to review and revise. (Tr., pp. 15-17.)

Among the grounds given for dismissal one was that no appeal had been asked for, granted or taken, that the cause was one which could only be brought to the Circuit Court of Appeals by an appeal or writ of error. That the question of law desired to be submitted was not correctly stated, and calling attention to facts not stated in the petition.

On September 11, 1923, on motion of counsel for petitioner, said Voss, trustee in bankruptcy, the Circuit Court of Appeals ordered that certified copies of certain parts of the record in said cause be filed and made a part of the petition to review and revise theretofore filed in that court, subject to the objection of respondents, towit: (1) Trustees amended petition filed in cause No. 625, In the matter of Wilbur Erskine, bankrupt, on May 27, 1922, with Charles A. Burnett, referee in bankruptcy; (2) Answer of Wilbur Erskine and Harold Taylor, filed June 26, 1922, with Charles A. Burnett, referee in bankruptcy; (3) Petition for review and assignment of errors of Harry W. Voss, trustee in bankruptcy of the estate of Wilbur Erskine, filed March 21, 1923, with Charles A. Burnett, referee in bankruptcy. (Tr., p. 29.)

On June 20, 1924, the Circuit Court of Appeals refused to dismiss the trustee in bankruptcy's petition to review, held that it should be allowed as an appeal and reversed the District Court. (Op. of C. C. A., Tr., pp. 32-40, incl.)

On August 8, 1924, and within the time granted by the Circuit Court of Appeals for filing same, your petitioners,

(7) That it was error to hold and decide that the rights of the wife in the real estate owned by the bankrupt did not vest in her as of the date of adjudication.

(8) That it was error to hold and decide that upon the wife's death (subsequent to adjudication in bankruptcy and appointment and qualification of the trustee in bankruptcy) all her rights in this property were extinguished, and that no interest in the property passed to her trustee. In effect thus holding and deciding that no rights vested in the wife upon the adjudication, and that there was no right therefore to go to her estate, or to her husband surviving.

(9) That the decision is in conflict with the decision of this honorable court, holding that under the bankruptcy act the wife's inchoate interest in her bankrupt husband's real estate does not pass to the trustee in bankruptcy and forms no part of the bankrupt's estate.

(10) That the decision of the Circuit Court of Appeals is in conflict with ruling decisions of the United States Circuit Courts of Appeal in other circuits, holding and deciding that the wife's inchoate interest vests absolutely in her by operation of law as of date of the adjudication.

(11) This decision of the Circuit Court of Appeals is in direct conflict with and ignores the ruling cases in *Indiana of Harlin, Guardian, etc., v. American Trust Co., Trustee in Bankruptcy,* 67 Ind. App. 213, presenting this precise question construing the Indiana statutes and declaring the wife's inchoate interest vests in her as of date of the adjudication in bankruptcy and becomes part of her separate estate.

(12) That the Circuit Court of Appeals erred in denying these petitioners—respondents below—petition for rehearing.

The contention made by your petitioners (respondents below) to the petition of the trustee in bankruptcy was that the trustee in bankruptcy never took the wife's inchoate interest in the bankrupt husband's real estate owned by him at the time of the filing of the petition and adjudication in bankruptcy; that the wife's inchoate interest formed no part of the bankrupt's estate, but that it went directly to the wife, then living, by operation of law as of the date of the adjudication in bankruptcy, and vested in her as her separate property at that time; that having once vested, the wife's subsequent death following the appointment and qualification of the trustee in bankruptcy in no wife defeated or affected the interest which had already theretofore vested; that having so vested it was part of the wife's estate upon her decease, passing either to her trustee under the will or, if not to her trustee, then to the husband, by statutory direction.

The trustee in bankruptcy controverted this, asserting that no title vested in the wife as of date of the adjudication; that it remained part of the bankrupt estate coming to the trustee in bankruptcy, and upon her death all rights were lost; that it was controlled by the Judicial Sales Act and not by the general statutes fixing the wife's marital rights, and that if any rights had taken effect, the husband was the heir under the Judicial Sales Act, and that it would, through him, again become part of the bankrupt's estate in bankruptcy, to be administered as part of such bankrupt estate.

The effect of the decision of the Circuit Court of Ap-

peals is to sustain the contention of the trustee in bankruptcy, and is in conflict with the uniform practice which has been followed by the bankruptcy court in the District of Indiana, and which is shown by the case of *Harlin, Guardian, v. American Trust Company, Trustee in Bankruptcy*, 67 Ind. App. 213, heretofore referred to, where a fee simple one-third of the husband's property was set off to the wife as of date of the adjudication as having vested in her on that date, as her separate property, and followed and confirmed by the Indiana Appellate Court.

That the apparent holding and decision of the Circuit Court of Appeals that the wife's title to her inchoate interest in the bankrupt husband's lands does not vest as of date of the adjudication, has already created confusion and uncertainty in the administration of the Bankruptcy Act in the District of Indiana, being in direct conflict with and contrary to the established precedents and holdings of the bankruptcy courts upon that particular question.

What effect the death of the wife of a bankrupt after adjudication and appointment and qualification of the trustee may have upon the vesting her interest in the husband bankrupt's property owned by him at the date of the adjudication has never been passed upon directly by this honorable court, so far as we are advised, and it is in the interest of correct and uniform construction and administration of the bankruptcy act that this question be finally determined by this court.

Your petitioners present herewith a certified copy of the entire record in this cause, and respectfully pray that writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to

certify and send to this court on a day certain to be therein designated a full and complete transcript and the record of all proceedings in said Circuit Court of Appeals in the case therein entitled In the Matter of Wilbur Erskine, Bankrupt. Harry W. Voss, as trustee of the estate of Wilbur Erskine, bankrupt, petitioner, against Harold Taylor, trustee of the estate under the will of Mary E. Erskine, deceased, and Wilbur Erskine, respondents, in said court on petition of said Harry W. Voss, trustee in bankruptcy, for review. No. 3298, to the end that said case may be reviewed and determined by this court, as provided by law, and that the judgment of said Circuit Court of Appeals in said case may be reversed by this honorable court and that your petitioners may have such other and further relief in the premises as to this court may seem just and proper.

Harold Taylor, Trustee under the Will of
Mary E. Erskine, Deceased.
Wilbur Erskine.
By Harold Taylor
Daniel H. Ortmeyer
Their Counsel.

State of Indiana, County of Marion, ss:

Harold Taylor, being duly sworn, says that he is one of the counsel for above named petitioners, that he has read the foregoing petition and that the matters therein stated are true to the best of his knowledge, information and belief.

Harold Taylor.

Subscribed and sworn to before me this 8th day of November, A. D., 1924.

My commission as notary public expires on the 25th day of November, 1926.

(Seal.) Walter J. Trimble

Notary Public within and for the County of Marion and State of Indiana.

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

Harold Taylor.

Of Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. ——.

HAROLD TAYLOR, *Trustee under the Will of Mary E. Erskine, Deceased,*
WILBUR ERSKINE,
Petitioners,
HARRY W. VOSS, *Trustee of the Estate of Wilbur Erskine, Bankrupt,*
Respondent.

No. ——

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Circuit Court of Appeals, in denying the motion to dismiss the petition to review, said:

> "The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the

parties could not affect the method of procedure to procure a review.

"For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an Act of September 6, 1916 (39 U. S. Stats. at L, p. 727; Sec. 1649a U. S. Compiled Stats. 1916):

" 'That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed.'

"While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, *supra*, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are law suits of the same kind and quality as other law suits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms 'appeal' and 'writ of error' should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, es-

> pecially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal."

Counsel respectfully urge that the learned judges of the Circuit Court were in error in the statement that "the record before us is in all respects the same as it would be on appeal." In an appeal there would be an order of the Circuit Court, or of the District Court, allowing appeal, and a copy of the complete record of the District Court, duly certified to by the clerk of that court, under the seal of the court.

In the instant case there is no such order of either court and no such certified transcript of the record. The case came to the Circuit Court of Appeals on an original petition to review and revise, filed June 18, 1923, and the only paper that was filed in that court was the original petition to review and revise, with the accompanying exhibits; which exhibits did not purport to be a transcript of the record, or certified to as such.

Such original petition to revise is not a record on appeal, as required by law. It is merely petitioner's petition to review and revise in matter of law. Respondents below, promptly on July 7, 1923, moved to dismiss said original petition to review and revise on the ground, among others, that no appeal had been asked for, or granted, or taken, and in ample time for them to have taken appeal and filed a record on appeal.

On September 11, 1923, on motion of counsel for said Voss, trustee in bankruptcy, certified copies of certain parts of the record in the cause, consisting of three papers, were made a part of petition to review and revise theretofore filed in that court.

After the filing of those additional papers on September 11, 1923, there was no record as on appeal on file in the Circuit Court of Appeals. The only papers on file in that court in said cause consisted of an original petition to review and revise, with the exhibits thereto attached, including the parts of the record admitted to be filed and made a part of the petition to review and revise by the order of September 11, 1923.

The filing in a Circuit Court of Appeals of an original petition to review and revise is not the filing of a record on appeal. It is a petition by a petitioner and is not the filing of a record on appeal. It is a petition by a petitioner and is not a record in the sense that the term "record" is used when we speak of filing a record on appeal.

Prior to the adoption of the amendment of September 6, 1916, the Supreme Court had said that a petition to review and revise under 24b and an appeal under 24a were exclusive, and not cumulative; that where a party had a right to review and revise under 24b, he did not also have a right to appeal under 24a. In the general law and equity practice frequently an appeal was taken when it should have been writ of error, or writ of error taken when it should have been appeal. Some times these were very close questions. Some times the proper procedure, whether of equity or of law, presented very close cases. Evidently this was the situation intended to be covered by the amendment of September 6, 1916, to the Judicial Code—Section 4 referred to.

During this same period mistakes had been made in seeking to obtain reviews by petition instead of appeal, and the clear distinction between the two procedures had been

pronounced by the Supreme Court, and followed by the various circuit courts of appeal of the United States. As in the *Matter of Loving*, 224 U. S. 183, and *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, where the difference in the nature of the two procedures was clearly defined and the court had held that the petition to revise was not the proper remedy where an appeal was the remedy provided for, and that a petition to review and revise could not be treated as an appeal.

Congress must be presumed to have known of this situation and that they must use language to include the separate statutory procedure of petitions to review and revise provided for in the bankruptcy act, if they intended Section 4 of the Act of September 6, 1916, to cover and include petitions to review and revise in bankruptcy. Yet, no such language is found in any part of the law. First, it was entitled "An Act to Amend the Judicial Code; to fix the time when annual terms of the Supreme Court shall commence and further to define the jurisdiction of that court." The express language of this amendment includes only appeals and writs of error which are the only established methods of appellate procedure under the general judicial code.

The petition to review and revise under 24b of the bankruptcy act is not a part of the general judicial code, but is confined to the bankruptcy act.

If, as we may assume, the Act of September 6, 1916, was intended to cover and protect against mistakes in the general appellate procedure under the general judicial code, how can judicial construction extend that meaning without any words to express it, to take in the statutory bank-

ruptcy procedure of petitions to superintend and revise, with its special and even informal and summary procedure.

Appeals in equity and writs of error in law serve the same purpose, in their respective procedures, to accomplish review in the Appellate Court and give practically the same jurisdiction involving law and facts; and they can well be used interchangeably; whereas the petition to review under the bankruptcy act presents only a question of law upon the facts as stated in the petition.

It is for these reasons that the courts have uniformly held that a petition to review could not be treated as an appeal; because it differs in its nature, and in the narrowed jurisdiction obtained by the Appellate Court and in the requirements of the procedure including no requirement as to the record from the lower court.

Yet, the language of the Amendment of September 6, 1916, is direct and positive and points out, not in general terms, but in specific language, naming the proceedings that are not to be dismissed. The words "no court shall dismiss a writ of error" and "no court shall dismiss an appeal" are definite and, we submit, exclusive. No other procedures are to be included in its terms.

Counsel respectfully urge that there is no rule of statutory construction that permits us to disregard such plain language, nor to disregard the fact that Section 4 of the Act of September 6, 1916, is by its title and associate sections made to refer only to the appellate procedure of appeals and writs of error under the general code.

These decisions of the Supreme Court defining and marking the essential differences between a petition to review and an appeal had stood for years prior to the enactment of the Judicial Code of September 6, 1916. In view of the established rule that the petition to review could not

be accepted as an appeal because of essential differences of procedure and jurisdiction, may it not be as well presumed that Congress in enacting said amendment to the judicial code that it would be unwise to have them made interchangeable, and that such a rule would be of doubtful benefit. And by what rule of statutory construction can an appellate court say that it will by judicial construction extend a statute relating to general equity and law procedure to cover a statutory procedure applicable only under the statute of which it forms a part. Would not such a rule lead to judicial enactment, rather than judicial construction, of law.

In *Gauzon v. Compania, Gen., etc.*, 245 U. S. 86, the Supreme Court has held that said Section 4 of the Act of September 6, 1916, does not abolish the distinction between writs of error and appeals, but only requires that the party seeking review shall have it in the appropriate way notwithstanding a mistake in choosing the mode of review.

The Supreme Court has laid down this rule which has never been reversed, changed or modified by any decision that we have been able to find: that the petition to revise was not the proper remedy where adverse interests are involved. In the *Matter of Loving*, 224 U. S. 183.

In *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, the Supreme Court makes a clear distinction between appeals allowed under the bankruptcy act and petitions to superintend and revise, calling attention to and defining the difference in the nature of the procedures and holding that a petition to superintend and revise could not be treated as an appeal, and calling attention to the fact that on appeal the jurisdiction of the Circuit Court of Appeals is

broadened, but on a petition to review the jurisdiction is narrowed.

This rule has been consistently followed by the several Circuit Courts of Appeal and petitions to review dismissed since the enactment of Section 4 of September 6, 1916.

No where in any decision of the Supreme Court, or of any of the Circuit Courts of Appeal, except in the instant case, has any court even intimated that Section 4 of the Act of September 6, 1916, was intended to apply to petitions to revise under Section 24b of the Bankruptcy Act, but invariably where the case could be brought up only on appeal such petitions to review have been dismissed, thus making direct conflict in the decisions of the Circuit Courts of Appeal in the different circuits.

In the very recent case of *McBride v. Mullinix*, from the Eighth Circuit Court of Appeals, 299 Fed. 162 (Advance Sheets dated August 28, 1924), where it was sought to bring the controversy up by petition to review under 24b, whereas it should have been brought up by appeal under 24a, as in the instant case, the Circuit Court of Appeals dismissed the petition.

In another case in the same circuit. *In re Smith-Flynn C., etc., Co.* (decided in 1923), 229 Fed. 465, the Circuit court of Appeals for the Eighth Circuit, in passing upon a case upon petition to review, said:

> "We are convinced that in the present case the proper remedy is appeal. Petition to revise is therefore dismissed."

The Circuit Court of Appeals for the Fourth Circuit, *In re Becker*, 285 Fed. 706, held that the matter presented was reviewable by appeal and not by petition to superin-

tend and revise. "The petition must therefore be dismissed." (Citing cases.)

The Circuit Court of Appeals for the Fifth Circuit, in the case of *In re Jones*, 294 Fed. 832, the petition to review was likewise dismissed as not the proper procedure.

The Circuit Court of Appeals for the Second Circuit, in the case of *In re Interborough Consolidated Corporation*, 288 Fed. 334, where only petition to review and appeal were taken, held that the remedies of appeal and petition to revise are not cumulative and that the inappropriate remedy will be dismissed. Dismissed the petition and heard the case upon the appeal, "which entitled this court to review both questions of law and fact."

It is to be noted that in the case of *In re Becker*, from the Fourth Circuit, referred to above, there was also an appeal taken. That the case was reviewed by the Circuit Court of Appeals upon the appeal; that petitions for writ of certiorari were presented to the Supreme Court in both the case on appeal and the case on petition to review; that both the petitions for certiorari were granted and that Supreme Court reviewed the case upon the appeal, not upon the petition to review and revise.

Liberty National Bank v. Bear, 44 Sup. Ct. Rep. Adv. Sheets, July 1, 1924, at page 499.

A direct conflict between the various circuits is shown to exist from these decisions, which should be settled by a decision of the Supreme Court, to establish uniform practice and procedure under the Bankruptcy Act through the United States.

Further, the matter of the construction of Section 4 of an Act of September 6, 1916, amending the general Judi-

cial Code as here presented, is an entirely new question, and the decision of the Circuit Court of Appeals in the instant case is upon principle in conflict with the ruling precedents of the Supreme Court, as well as in conflict with the decisions of the Circuit Courts of Appeal in other circuits, and which can only be settled by a ruling from the Supreme Court.

What effect does the death of the wife living at date of the adjudication in bankrutcy and appointment of the Trustee in Bankruptcy have upon her dower or other marital interest in the lands of her bankrupt husband, presumed to have vested in her by operation of law as of the date of the adjudication under the provisions of the Bankruptcy Act.

That dower or inchoate interest of the wife living at date of the adjudication and appointment and qualification, in the lands of the bankrupt, does not pass to the Trustee in Bankruptcy under the provisions of the Bankruptcy Act, has been held by the Supreme Court as well as Circuit Courts of Appeal in various circuits.

Sec. 70a (5) Bankrutcy Act;
Porter v. Lazear, 109 U. S. 84;
In re Hays (6th Cir.), 181 Fed. 674, 676;
Marine National Bank v. Swigert (6th Cir.), 262 Fed. 254;
Thomas v. Woods (8th Cir.), 173 Fed. 585.

To the same effect:

Harlin, Gdn. v. American Trust Co., Trustee in Bankruptcy, 67 Ind. App. 213, 218.

It is to be noted that under the Indiana Statutes, dower has been abolished and in lieu thereof the wife is given absolute fee simple interest in one-third, one-fourth or one-fifth, according to the value of the husband's property; where it is over $20,000, it is an undivided one-fifth interest.

The Indiana Statutes further provide that the wife can not be deprived of her interest, except with her assent, evidenced by her acknowledgment thereof in the manner required by law.

It has been the uniform practice in bankrutcy matters in the District of Indiana to set off to the wife such undivided interest as of date of the adjudication as appears was done by the referee in the bankruptcy proceedings mentioned in the case of *Harlin, Gdn., v. Am. Trust Co., Trustee in Bankruptcy,* already referred to.

The sections of the statutes fixing the wife's interest in the husband's property, and which your petitioners assert are controlling, are Sections 2864, 3014, 3029 and 3037, Burns' R. S. Ind. 1914. These sections are as follows, arranging them for the purposes of this inqury, in their logical order, to-wit:

Section 3037 reads:

> "35. No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

Section 3029 reads:

> "27. A surviving wife is entitled, except as in section 17 (Sec. 2483) excepted, to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions."

Section 3014 reads:

> "17. If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value ten thousands dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors."

Section 2864 reads:

> "122. If the decedent leave a widow, and the real estate owned by him at his death shall not exceed ten thousand dollars in value, the court shall direct the sale of the undivided two-thirds parts thereof for the payment of said debts and liabilities; and if the value thereof exceed ten thousand dollars, and do not exceed twenty thousand dollars, the court shall order the sale of the undivided three-fourths thereof; and, if it exceed in value twenty thousand dollars, the undivided four-fifths thereof, for said purpose."

These sections are respectively Sections 17, 27 and 35 of the Act of 1852, entitled, "An Act regulating descents and

the apportionment of estates," and Section 122 of the Decedents' Estate Act of 1881, entitled "An Act providing for the settlement and distribution of decedents' estates."

It will be noted that by the language of the Indiana State Statutes above quoted, the wife's inchoate interest, whether it be one-third, one-fourth or one-fifth as the amount of the husband's estate may vary, cannot be sold to pay the husband's debts but the title vests directly in the wife. The court directs the sale of only the undivided interest of the husband, the wife's remaining undivided interest vesting in her free of any rights of creditors or others.

The Circuit Court is evidently in error in holding that the right of composition prevents the title vesting by operation of law as of date of adjudication. There is no evidence nor any statement in the record presenting any question arising as upon a composition.

As the right of composition is defined by the Supreme Court in *Cumberland Glass Co. v. DeWitte*, 237 U. S. 447, 453, it is rather in the nature of a contractual relation voluntarily entered into by offer of the bankrupt and accepted by a majority of the creditors, and has no bearing upon the bankruptcy, unless an offer of composition has been confirmed; otherwise, the estate shall be administered in bankruptcy as therein provided. To hold that right of composition, never exercised, holds in abeyance the title of the trustee for any period, contrary to Section 70, *a*, would be indirect conflict with the express language of the statute and the decisions construing same.

The case of *Davis v. Kelly*, 97 N. E. 336, decided by the Supreme Court of Indiana, relied upon by the Circuit Court of Appeals in this case, does not present a situation analagous to the matter here involved, as there was no ques-

tion of bankrutcy or title to a trustee in bankruptcy, and the sections of the statutes fixing the wife's inchoate interest, here referred to, were not in any wise involved.

The same is true as to all the Indiana cases cited by the Circuit Court. None involve bankruptcy.

The Judicial Sales Act of 1875 referred to by the Circuit Court of Appeals in its opinion is an act relating to certain judicial sales as is shown by its title, and does not change or impair the general statutes of descent, and which are controlling within the intent and meaning of the Bankruptcy Act, as construed by the courts. The title of the 1875 act clearly establishes the distinction. The Act of 1875 is entitled: "An Act vesting the inchoate interest of married women in the lands of their husbands in the title of the husband therein has been divested by certain judicial sales, providing for the possession thereof, and the descent of such vested estate, and matters connected with such sales." (Acts 1875, page 178, approved March 11, 1875.)

The act itself does not purport to create the inchoate interest; in fact, it only refers to it. The Bankruptcy Act relates to the general rule of the state as to the wife's inchoate right of dower. The Act of 1875 does not purport to cover the administration of all the husband's property, either as in case of general assignment or the administration of a decedent's estate. It is easily conceivable that the wife might get the benefit of the Act of 1875 as to a particular parcel or parcels of real estate, and the husband still have more than sufficient property out of which to make good her inchoate right of dower. To hold that the Judicial Sales Act of 1875 applies and controls in bankruptcy matters, it would be necessary to hold that the

Federal Bankruptcy Act is a judicial sale, that it takes the wife's inchoate interest and sells it and pays her the fixed sum therefor; all of which is contrary to the language of the Bankruptcy Act itself and to the federal decisions construing the act.

Recognizing that it would be improper to burden this brief with an extended quotation from a reported case, we invite this court's attention particularly to an Indiana case, which is on all fours with the instant case, and which is the ruling case in Indiana upon this point, and which reviews the Bankruptcy Act and the Indiana Statutes relied upon by your petitioners, and holds that the undivided interest (one-fourth in that case) vests upon the date of adjudication, and which was overlooked or ignored by the Circuit Court, though cited in counsel brief. See *Harlin, Gdn. v. American Trust Co., Trustee in Bankruptcy*, 67 Ind. App. 213. That was an action by the Trustee in Bankruptcy against the Guardian of the wife, for partition.

In the bankruptcy proceedings, the Referee in Bankruptcy had set off to the wife an undivided one-fourth as representing her statutory inchoate interest and ordered the trustee to sell the remaining three-fourths. He had been unable to sell and brought suit for partition. The court sustains the suit, finds the wife became a tenant in common to the lands with the Trustee in Bankruptcy upon the vesting of the title as of date of adjudication.

While the opinion refers to the Judicial Sales Act, it quotes and relies upon the sections we have quoted, emphasizing Section 3037, that the wife's interest may not be alienated or taken from her, and is complete without any reference or weight given to the Judicial Sales Act.

tion of bankrutcy or title to a trustee in bankruptcy, and the sections of the statutes fixing the wife's inchoate interest, here referred to, were not in any wise involved.

The same is true as to all the Indiana cases cited by the Circuit Court. None involve bankruptcy.

The Judicial Sales Act of 1875 referred to by the Circuit Court of Appeals in its opinion is an act relating to certain judicial sales as is shown by its title, and does not change or impair the general statutes of descent, and which are controlling within the intent and meaning of the Bankruptcy Act, as construed by the courts. The title of the 1875 act clearly establishes the distinction. The Act of 1875 is entitled: "An Act vesting the inchoate interof married women in the lands of their husbands wh the title of the husband therein has been divested by certain judicial sales, providing for the possession thereof, and the descent of such vested estate, and matters connected with such sales." (Acts 1875, page 178, approved March 11, 1875.)

The act itself does not purport to create the inchoate interest; in fact, it only refers to it. The Bankruptcy Act relates to the general rule of the state as to the wife's inchoate right of dower. The Act of 1875 does not purport to cover the administration of all the husband's property, either as in case of general assignment or the administration of a decedent's estate. It is easily conceivable that the wife might get the benefit of the Act of 1875 as to a particular parcel or parcels of real estate, and the husband still have more than sufficient property out of which to make good her inchoate right of dower. To hold that the Judicial Sales Act of 1875 applies and controls in bankruptcy matters, it would be necessary to hold that the

Federal Bankruptcy Act is a judicial sale, that it takes the wife's inchoate interest and sells it and pays her the fixed sum therefor; all of which is contrary to the language of the Bankruptcy Act itself and to the federal decisions construing the act.

Recognizing that it would be improper to burden this brief with an extended quotation from a reported case, we invite this court's attention particularly to an Indiana case, which is on all fours with the instant case, and which is the ruling case in Indiana upon this point, and which reviews the Bankruptcy Act and the Indiana Statutes relied upon by your petitioners, and holds that the undivided interest (one-fourth in that case) vests upon the date of adjudication, and which was overlooked or ignored by the Circuit Court, though cited in counsel brief. See *Harlin, Gdn. v. American Trust Co., Trustee in Bankruptcy*, 67 Ind. App. 213. That was an action by the Trustee in Bankruptcy against the Guardian of the wife, for partition.

In the bankruptcy proceedings, the Referee in Bankruptcy had set off to the wife an undivided one-fourth as representing her statutory inchoate interest and ordered the trustee to sell the remaining three-fourths. He had been unable to sell and brought suit for partition. The court sustains the suit, finds the wife became a tenant in common to the lands with the Trustee in Bankruptcy upon the vesting of the title as of date of adjudication.

While the opinion refers to the Judicial Sales Act, it quotes and relies upon the sections we have quoted, emphasizing Section 3037, that the wife's interest may not be alienated or taken from her, and is complete without any reference or weight given to the Judicial Sales Act.

The Circuit Court of Appeals in its opinion, says:

> "We are of opinion that on the death of the wife all her right in this property was extinguished."

As there is nothing in the decision of the Circuit Court to indicate that anything had vested or come to the wife as a result of the adjudication in bankruptcy, the plain meaning of this is that there was no right taken by the wife at any time, and that any conditional right was extinguished by her death subsequent to the appointment and qualification of the Trustee in Bankruptcy.

How the learned court could decide this question as it did, and express no opinion as to what rights a wife living at the date of adjudication and appointment and qualification of the trustee may have or take under the Bankruptcy Act and the Indiana statutes, we are unable to understand.

If we read the opinion correctly it is based upon the theory that the titles do not vest under the Bankruptcy Act by operation of law as of date of the adjudication, as provided in Section 70a (5) of the Bankruptcy Act, and misconstruing or giving no effect to the Indiana statutes providing that the wife's inchoate interest can not be alienated or taken from her without her consent, which must be expressed according to law, which would require her joining in a deed or other instrument of conveyance with her husband. The decision apparently gives no effect to the language "by operation of law", in the Bankruptcy Act, and which has been so uniformily construed since those words were included in the Bankruptcy Act. It apparently overlooks the fact that under the Indiana statutes the wife's inchoate interest in an absolute fee, and not a life estate. And, in any view of the matter, no matter which theory of

the Indiana statutes as to inchoate interest may be finally taken, there was a vested interest, which the wife never conveyed or assigned to anyone; and at her death it went either by her will to her trustee, if not to him, then to her surviving husband. Yet the Circuit Court, by its finding, declares there was no interest; but, if there was any, it "was extinguished by her death."

The confusion from such decision can be cleared up only by a ruling and decision by the Supreme Court.

The question here presented would never have been raised had it not been for the death of the wife. It appears from the facts in the record that offers were received by the Trustee in Bankruptcy after his appointment, but not accepted by him. If they had been accepted, even upon the Trustee in Bankruptcy's theory, the question would have been entirely different.

To emphasize the petitioners' contention that the title vests as of the date of the adjudication in bankruptcy, we would ask how long could sales be deferred and how it is to be determined under the Bankruptcy Act as to what date and when and upon what happening shall the title to the property vest in the trustee and be closed. Does not the very suggestion of such a construction of the Bankruptcy Act indicate a matter of doubt and consequent inequality of administration in the various circuits and districts of the United States?

We respectfully submit that the petition should be granted and writ of certiorari issued as prayed for.

HAROLD TAYLOR,
DANIEL H. ORTMEYER,
Counsel for Petitioners.

FILED
JAN 29 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 199.

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, AND WILBUR ERSKINE,
Petitioners,

v.

HARRY W. VOSS, TRUSTEE OF THE ESTATE OF WILBUR ERSKINE, BANKRUPT,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

HAROLD TAYLOR,
DANIEL H. ORTMEYER,
Attorneys for Petitioners.

E. A. HARDIN PRINT, INDIANAPOLIS

INDEX.

	Page
Advisement, cause taken under	17
Amended petition of Trustee in Bankruptcy	3, 11, 13
Answer to amended petition	4, 14
Appearance of counsel before Referee	4
Appendix	46
Argument	22
Assignment of errors	18
Bankrupt, Wilbur Erskine adjudged a	12
Bankruptcy, Trustee in, named	12
Bankruptcy, Order of Referee in	5, 11, 13, 14
Bankruptcy, Order of Referee in, approved	5
Cases sustaining jurisdiction	10
Cause taken under advisement	17
Certiorari, Petition for Writ of	18
Certiorari, Writ of, ordered	17
Date of judgment to be reviewed	2
Dismiss, Motion to	16
Dismiss, Motion to, filed	15
Dismiss, Motion to, not directly ruled on	8
Errors relied on	18
Extention of time for filing petition for rehearing	17

Page

Filing of opinion in C. C. A. 17

Grounds on which jurisdiction invoked 2

Hearing on petition to review and revise 17

Indiana, Statutes of 49, 50, 51, 52, 53

Judgment of C. C. A. 2

Motion to dismiss filed 15, 16
Motion to extend time for filing petition for rehearing 17
Motion to extent time for filing petition for rehearing granted 17

Opinion of C. C. A. on hearing below 1
Opinion of C. C. A. filed 17
Opinion of C. C. A., report of 1
Order of D. C. reversed 11, 17
Order of Referee in Bankruptcy 5, 11, 13, 14
Order of D. C. approving order of referee 5
Order of C. C. A. making part of petition to review and revise certain petitions and orders 17
Order being reviewed in S. C. 2
Overruling of petition for rehearing 18

Petition to review order of Referee 5, 15
Petition for Writ of Certiorari 18
Petition for Writ of Certiorari granted 18

Page

Petition to Review and Revise 6, 15
Petition for Rehearing 18
Petition to Review and Revise, hearing on 17

Record filed with petition, return to writ 18
Rehearing, Petition for 18
Rehearing, Petition for, overruled 18
Report of Opinion in C. C. A. 1
Ruling on Specific Claims 3

Specific claims advanced below 3
Statement of the case 11
Statutes of United States 46, 47, 48, 53, 54
Statutes of Indiana 49, 50, 51, 52, 53
Statutory basis of jurisdiction 9

Time for filing petition for rehearing extended 17
Trustee's Amended Petition 3, 11, 13

United States, Statutes of 46, 47, 48, 53, 54

Will of Mary E. Erskine probated 13
Writ of Certiorai, Petition for 18
Writ of Certiorari ordered 11, 18

TABLE OF CASES.

	Page
Andrews v. Partridge, 228 U. S. 479	10
Axle, In re L. M. Co., 3 Fed. (2nd) 581	32, 33
Baltimore, In re Pearl Hominy Co., 5 Fed. (2nd) 553	33
Bardes v. Hawarden Bank, 178 U. S. 524	26
Bear v. Liberty National Bank of Roanoke, Va., 285 Fed. 703, also 706	32
Blanke Mfg. & Supply Co. v. Craig, 287 Fed. 345	32
Clarke v. Larremore, 188 U. S. 486	10
Consumers' Packing Co., In re, 268 Fed. 198	31
Cowen Co., In re Geo. W., 289 Fed. 192	32
Craig, In re Lumber Co., 266 Fed. 692	25, 35
Duncan v. Johnson & Co., 3 Fed. (2 nd) 422	32, 33
Duryea Power Co. v. Sternbergh, 218 U. S. 299	36
Eppley v. Baylor, 293 Fed. 306	32, 33
Everett v. Judson, 228 U. S. 474	10
Feder v. Goetz, 264 Fed. 619	32
First Natl. Bank v. Chicago, etc., Trust Co., 198 U. S. 280	26
Frederick v. Silverman, 250 Fed. 75	34
Friend, In re, 134 Fed. 778	23
Ganzon v. Compania, 245 U. S. 86	36
Glove Corp., In re B. & B., 279 Fed. 372	32, 33

Page

Goldstein v. Johnson, 3 Fed. (2nd) 228 33
Griffin v. Lenhart, 266 Fed. 675, also 671 ..... 25, 32
Grotton Laundry Service, Inc., In re, 5 Fed. (2nd) 63 .. 33

Hanover Natl. Bank v. Moyses, 186 U. S. 181, 190 40
Harlin, Gdn., v. American Trust Co., Trustee in Bankruptcy, 67 Ind. App. 213 ..... 21, 24, 25, 39, 41
Hays, In re, 181 Fed. 674, 676 ..... 38, 40
Henkin v. Fousek, 267 Fed. 557 36
Herbert & Co., In re, 263 Fed. 351 32
Higgins v. Ormsby, 156 Ind. 82 44
Holden v. Stratton, 191 U. S. 115 10
Horton v. Mendelsohn, 249 Fed. 185 34

Loving, Matter of, 224 U. S. 183 ..... 25, 37

Marine Natl. Bank v. Swigert, 262 Fed. 254 39
Mohler v. Morris, 291 Fed. 571 32

National Discount Co., 272 Fed. 570 ..... 32, 33

Parker, In re, 283 Fed. 404 33
Peoples Natl. Bank of Strasburg, Va., v. Green, 296 Fed. 294 ..... 32, 32
Porter v. Lazear, 109 U. S. 84 38

Rasmussen, In re, 287 Fed. 860 32
Reilly, In re, 258 Fed. 121 34
Richardson Co., In re A. E., 3 Fed. (2nd) 600 34

Page

Stokes v. Sedberry, 275 Fed. 894 32

Thomas v. Woods, 173 Fed. 585 ..... 39, 40
Thompson, In re, 264 Fed. 913 35
Toole, In re, 270 Fed. 195 32

Voss, Trustee, v. Taylor, Trustee, 1 Fed. (2nd) 149 1

Weidhorn v. Levy, Trustee, 253 U. S. 268 10
Western Rope & Mfg. Co., In re, 298 Fed. 926 32
White v. Stump, 266 U. S. 310 39
Wood, In re, 278 Fed. 355 32

STATUTES.

United States.

Act of January 28, 1915, chapt. 22, sec. 4; 38 Stats. at L. 804, as amended by Act of September 6, 1916, chapt. 448, sec. 3; 39 Stats. at L. 727; U. S. Comp. Stats. sec. 1120a; (Jud. Code, Sec. 128, amended) 9

Act February 13, 1925, c. 229, sec. 14; 43 Stats. at L. 941 ..... 9, 10

Act September 6, 1916, c. 448, sec. 4; 39 Stats. at L. 727; U. S. Comp. Stats. sec. 1649a 8, 18, 19, 23, 27, 28, 29, 31, 36

Acts July 1, 1898, c. 541, sec. 24a; 30 Stats. at L. 553; U. S. Comp. Stats., sec. 9608 ..... 7, 19, 23, 27, 28, 29, 30

Act of July 1, 1898, c. 541, sec. 24b; 30 Stats. at L. 553; U. S. Comp. Stats., sec. 9608 ..... 7, 19, 23, 27, 28, 29, 30, 34

Act of July 1, 1898, c. 541, sec. 25a; 30 Stats. at L. 553; U. S. Comp. Stats., sec. 9608 ..... 29, 30, 34, 35

Act of July 1, 1898, c. 541, sec. 70a; 30 Stats. at L. 565; amended February 5, 1903, c. 487, sec. 16; 32 Stats. at L. 800; U. S. Comp. Stats. 9654 ..... 40, 41, 43, 44

Act of February 13, 1911, c. 47, sec. 1; 36 Stats at L. 901; U. S. Comp. Stats., sec. 1656 26

Indiana.

Sec. 3013, Burns' Ind. Ann. Stats. 1914; Sec. 2639, R. S. 1881 38

Sec. 3014, Burns' Ind. Ann. Stats. 1914; Sec. 2640, R. S. 1881 38

Sec. 3029, Burns' Ind. Ann. Stats. 1914; Sec. 2652, R. S. 1881 50
Sec. 3037, Burns' Ind. Ann. Stats. 1914; Sec. 2660, R. S. 1881 ..... 38, 43
Sec. 2864, Burns' Ind. Ann. Stats. 1914; Sec. 2502, R. S. 1881 51
Sec. 3052, Burns' Ind. Ann. Stats. 1914; Sec. 2669, R. S. 1881 39
Sec. 3053, Burns' Ind. Ann. Stats. 1914; Sec. 2670, R. S. 1881 52
Sec. 3054, Burns' Ind. Ann. Stats. 1914; Sec. 2671, R. S. 1881 52
Sec. 3055, Burns' Ind. Ann. Stats. 1914; Sec. 2672, R. S. 1881 53

Supreme Court of the United States

OCTOBER TERM, 1925.

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, AND WILBUR ERSKINE,
Petitioners,
v.
HARRY W. VOSS, TRUSTEE OF THE ESTATE OF WILBUR ERSKINE, BANKRUPT,
Respondent.
No. 199

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

The opinion of the Circuit Court of Appeals for the Seventh Circuit, refusing to dismiss the petition of the Trustee in Bankruptcy to review and revise holding that the petition to review should be treated as though it were an appeal, and reversing the United States District Court for the District of Indiana, is found at pages 30, 31, 32, 33, 34, 35 and 36 of the Record and is reported in 1 Fed. (2nd) 149.

JUDGMENT BELOW.

The judgment to be reviewed is a judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 37), rendered June 20, 1924, which reversed an order of the United States District Court for the District of Indiana (R. 14), affirming an order and judgment of the Referee in Bankruptcy (R., 25, 26), which determined the wife's interest in the real estate of the bankrupt husband at the time of filing the petition and adjudication in bankruptcy to be a one-fifth interest, and giving judgment to said Taylor, Trustee under the will of the wife, against said Voss, Trustee in Bankruptcy, for $7,374.00, that being one-fifth of the proceeds of the sales of real estate made by said Trustee in Bankruptcy, all of the parties having joined in the sales and deeds of conveyance in order to secure better sales and better prices. The case was before the Circuit Court of Appeals upon an original petition to review and revise. There was no appeal or writ of error.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. Date of Judgment to Be Reviewed.

The judgment to be reviewed was rendered June 20, 1924, by the United States Circuit Court of Appeals for the Seventh Circuit (R. 37), which re-

versed an order of the District Court of the United States for the District of Indiana (R. 14), affirming an order of the Referee in Bankruptcy. (R., 25, 26.)

2. Specific Claims Advanced and Rulings Made.

The action is a controversy arising in bankruptcy proceedings, an adversary proceeding, brought by said Voss, Trustee of Wilbur Erskine, Bankrupt, against said Taylor, Trustee under the last will of Mary E. Erskine, deceased wife of said Wilbur Erskine, and Wilbur Erskine as surviving husband.

The action was begun by the filing of an amended petition May 27, 1922, before the Hon. Charles A. Burnett, Referee in Bankruptcy, to which said Taylor, Trustee, made voluntary appearance to give the court jurisdiction, under and pursuant to an agreement, by which the question of the wife's interest, and quantum thereof, in the real estate of her bankrupt husband, was submitted to the court for adjudication.

The amended petition alleged that the bankrupt owned real estate of the value of more than $20,000.00; that he had a wife alive and living with him at the time of filing the petition and of the adjudication in bankruptcy, and that she died subsequent to the appointment of the Trustee in Bankruptcy, further alleging that a question had arisen as to

title; alleging that neither the wife, nor her Trustee under her said last will, nor her surviving husband had any interest in said real estate, and asking that his title as Trustee in Bankruptcy be quieted to all of said real estate (R., 22).

Under date of June 24, 1922, said Taylor, Trustee under the will, and said Wilbur Erskine, surviving husband, appeared and filed their answer to said amended petition before Hon. Charles A. Burnett, Referee in Bankruptcy (R. 23, 24); said answer alleges the ownership of the real estate in the bankrupt at the date of the filing of petition and of the adjudication in bankruptcy; that at said date and for many years prior the bankrupt had a wife, Mary E. Erskine, alive and living with him, and that they were residents of Vanderburgh County, Indiana; that his said wife died testate on March 21, 1922; that by said will all of her estate, real and personal, was devised to said Taylor, Trustee; that said wife was survived by said Wilbur Erskine, the bankrupt; that the wife had never parted with her interest in said real estate; that upon the adjudication December 20, 1921, the wife's interest became a vested interest in and to the real estate then owned by her said husband, under and in accordance with the laws of the State of Indiana and the Federal Bankrupcy Act, and that she had never parted with, incumbered, transferred or conveyed in any way her interest as the wife of said Erskine, in said real estate; and asking the court to determine

the interest of the wife, and for all other proper relief (R., 23, 24).

For the purpose of the submission, stipulations as to facts were made (R., 4, 5, 6).

The trial before the Referee resulted in finding and judgment, rendered March 14, 1923, in favor of the petitioner herein, said Harold Taylor, Trustee under the will of said Mary E. Erskine, deceased (R., 11, 12), finding that at the time of the adjudication in bankruptcy, the bankrupt had a wife living, said Mary E. Erskine, who died testate on the 21st day of March, 1922; that said Harold Taylor was named Trustee under the will of said decedent, and is vested with all the wife's interest in the real estate; that said Taylor, as such Trustee under the will of the wife, was entitled to one-fifth of the proceeds of the sale of the real estate made by said Voss, Trustee in Bankruptcy, pursuant to the agreement made between the said Trustee in Bankruptcy, the Trustee under the will of the wife, and said Erskine as the surviving husband.

March 21, 1923, the Trustee in Bankruptcy filed a petition for review of the order of the Referee (R., 24, 25), and the petition and papers were transmitted and filed in the District Court under the same date (R., 13, 14).

April 24, 1923, the petition for review was heard before the District Court, resulting in an order and judgment of the District Court affirming the order of the Referee. No appeal or writ of error was

en, asked for or granted from the order of the trict Court.

June 18, 1923, said Voss, Trustee in Bankruptcy, l in the United States Circuit Court of Appeals the Seventh Circuit his original petition to re- v and revise (R., 1, 2, 3, 4), with exhibits: "A," ulation of facts for submission before the eree (R. 4, 5, 6), copy of will of deceased wife 6, 7, 8, 9); "B," agreement between parties to mit question of wife's interest to court, to join in ng and conveying property, trustee to retain one- n of proceeds pending final decision of court; duplicate," order of referee; "C duplicate," ref- e's report transmitting petition and papers to trict Court; "D," order of the District Court.

The Referee in Bankruptcy and the District rt in approving the order of the Referee in kruptcy held that the one-fifth inchoate interest he wife, Mary E. Erskine, in the real estate be- ie vested in her as of the date of adjudication of kruptcy, and that said one-fifth interest passed Harold Taylor, her trustee, by the terms of her .

The Trustee in Bankruptcy took the question to United States Circuit Court of Appeals for the enth Circuit by petition to review and revise the er of the District Court. There was no appeal or t of error asked for or taken. The petitioners

herein, res
moved to d
the groun
bankruptc
tion 24a o
by petitio
24b of th
merits, al
her upon
with said
to said T
18, 19.)

The s
Court of A
be stated

(1) T
jurisdicti
petitioner
tempted t
by origin
tion 24b
ing in ba
vides tha
by appeal
and, that

(2) T
kine in t
bankrupt
bankrupt

herein, respondents in the Circuit Court of Appeals, moved to dismiss the petition to review and revise on the ground that this was a controversy arising in bankruptcy proceedings, reviewable only under Section 24a of the Bankruptcy Act, and not reviewable by petition to review and revise, as under Section 24b of the Bankruptcy Act, and answered on the merits, alleging that the wife's interest vested in her upon adjudication; that she had never parted with said interest, and, that her interest had passed to said Taylor, Trustee under her will. (R., 17, 18, 19.)

The specific claims advanced in the Circuit Court of Appeals by the petitioners in this court may be stated under two heads:

(1) That the Circuit Court of Appeals had no jurisdiction in the matter, for the reason that the petitioner in that court, respondent here, had attempted to present to the Circuit Court of Appeals by original petition to review and revise, under section 24b of the Bankruptcy Act, a controversy arising in bankruptcy; whereas the bankruptcy act provides that such controversies can be reviewed only by appeal under Section 24a of the Bankruptcy Act, and, that no appeal had been taken; and

(2) That the inchoate interest of Mary E. Erskine in the real estate owned by her husband, the bankrupt, at the time of the filing of the petition in bankruptcy and date of adjudication, became vested

in her by operation of law as of the date of the adjudication, and thereupon became a part of her separate estate and could not be divested except by some act of her own; that not having been so divested by her within her lifetime it passed by the terms of her will to said Taylor, as trustee.

The Circuit Court of Appeals in passing on your petitioners' motion to dismiss the trustee in bankruptcy's petition to review and revise, in effect denying the motion to dismiss, held that the trustee in bankruptcy had chosen the wrong remedy; that

> "The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the parties could not affect the method of procedure to procure a review.
>
> "For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an Act of September 6, 1916 (39 U. S. Stats. at L. p. 727; Sec. 1649a U. S. Compiled Stats. 1916)."

The Circuit Court of Appeals, in its opinion held, and in effect holds by its order, that the above section applies to and includes petitions to review and revise, when an appeal would be the correct remedy; and says "especially where, as here, the record before us is in all respects as it would be on appeal. We shall consider the matter as here on appeal."

Your petitioners' motion to dismiss the petition to review and revise was therefore impliedly passed upon and denied by the opinion and order of the Circuit Court of Appeals.

The ruling of the Circuit Court of Appeals on these petitioners' second contention, as disclosed by the opinion of the court, was that on her death all of the interest of Mary E. Erskine in the real estate which might have come to her at the date of adjudication was extinguished and that therefore no interest passed under her will to said Taylor, her trustee. (R., 36.)

3. Statutory Basis of Jurisdiction.

This cause is here on writ of certiorari.

The Act of January 28, 1915, Chapt. 22, Sec. IV, 30 Stats. at L. 804, amended September 6, 1916, Chapt. 448, Sec. 33, 39 Stats. at L. 727, U. S. Comp. Stats., Sec. 1120a, provides that a decree of the Circuit Court of Appeals in proceedings under the Bankruptcy Act, or in controversies arising thereunder, shall be final, save only that it shall be competent for the Supreme Court of the United States to require by certiorari on petition of a party thereto that the proceeding, cause or controversy be certified to it for review with the same power and authority as if taken there by appeal or writ of error.

(While this act as amended was repealed by the Act of February 13, 1925, Chapt. 229, Sec. 13, 43 Stats. at L. 941, Section 14 of the repealing Act provides that it shall not affect the right to review or mode or time for exercising same as regards any judgment or decree entered prior to the time the act

takes effect. *Said Section 14 provides that the* act shall take effect three months after its approval.

The judgment herein sought to be reviewed was rendered by the Circuit Court of Appeals for the Seventh Circuit on June 20, 1924, and prior to February 13, 1925, the day on which the repealing act was approved.) Above statutes, and all Federal and State Statutes referred to, are quoted at length in the Appendix hereto, pages 46-54, inclusive.

4. Cases Sustaining Jurisdiction.

A decision of a Circuit Court of Appeals in a case taken to that court on petition to review and revise any order or ruling in bankruptcy proceedings is reviewable in the Supreme Court of the United States on writ of certiorari.

Holden v. Stratton, 191 U. S. 115.
Andrews v. Partridge, 228 U. S. 479;

Rulings of Circuit Courts of Appeal on petitions to review and revise in bankruptcy matters have been reviewed by certiorari in the Supreme Court of the United States in

Andrews v. Partridge, 228 U. S. 479;
Everett v. Judson, 228 U. S. 474;
Clarke v. Larremore, 188 U. S. 486;
Weidhorn v. Levy, Trustee, 253 U. S. 268.

STATEMENT OF THE CASE.

This is an adversary proceeding in bankruptcy begun by the filing by Voss, Trustee in Bankruptcy, of his amended verified petition (R., 22, 23), before the Referee, alleging that Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and Wilbur Erskine, as surviving husband, claimed an interest in the proceeds of the sale of the real estate, in the hands of the Trustee, adverse to the Trustee, and asking that title to same be quieted in Voss, Trustee in Bankruptcy. Taylor, Trustee, and Wilbur Erskine voluntarily appeared before the Referee. The Referee's order was that one-fifth of the proceeds should be paid to Taylor, Trustee under the will of Mary E. Erskine (R., 12). On petition to review, the order of the Referee was approved by the United States District Court for the District of Indiana (R., 14). This order was sought to be reviewed in the United tSates Circuit Court of Appeals for the Seventh Circuit by original petition to review and revise filed therein on June 18, 1923 (R., 6). Petitioners herein moved to dismiss and answered on the merits. By its order of June 20, 1924 (R. 37), the judgment of the District Court of the United States for the District of Indiana was reversed by the United States Circuit Court of Appeals for the Seventh Circuit. On March 2, 1925, petitioners' petition for writ of certiorari was granted by this court (R., 53).

For the purposes of the hearing before the Referee in Bankruptcy the parties made certain stipulations. (R., 4, 5, 6.) Stipulations and facts shown by the record are:

On December 20, 1921, Wilbur Erskine was adjudged a bankrupt in the District Court of the United States for the District of Indiana (R., 4), on his petition filed in said court December 19, 1921.

On said dates, and for many years prior thereto, said bankrupt lived with his wife, Mary E. Erskine, who was a first wife with children (R., 5). At said times said Wilbur Erskine was the owner of real estate of a value in excess of $20,000 located in Vanderburg County, State of Indiana, of which county and state said bankrupt and his said wife were residents.

On February 25, 1922, Harry W. Voss was duly chosen, named and qualified as trustee for said bankrupt (R., 5).

That Mary E. Erskine, wife of said bankrupt, died testate on March 21, 1922, leaving surviving her the bankrupt and their two children (R., 5).

The said Mary E. Erskine had never joined in any conveyance of the real estate herein above referred to, had not joined the bankrupt in his petition in bankruptcy and had not filed any suit in partition, or otherwise, to have her interest in said real estate set off to her (R., 6).

That March 24, 1921, the last will of said bankrupt's wife was duly probated in the Probate Court of said Vanderburgh County, Indiana, by the terms of which she bequeathed and devised to said Harold Taylor, Trustee, in trust, all of her estate, real and personal. (R., 6, 7, 8 and 9.)

As there was a question as to the right of the Trustee in Bankruptcy to give complete title, including the interest of the wife, in the real estate of the bankrupt, in order to give such complete title to any purchaser, an agreement was entered into on June 24, 1922, by Harry W. Voss, Trustee in Bankruptcy, Wilbur Erskine and Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, by the terms of which it was agreed that all parties would join in conveying any of the real estate sold by the trustee in bankruptcy, and in order to protect any interest therein of Harold Taylor, trustee under the will of Mary E. Erskine, deceased, said trustee in bankruptcy agreed to hold and keep an amount not less than one-fifth of the proceeds of any sale or sales of said real estate, pending decision by the courts, provision for submitting the question to the court being included in the agreement. (R., 10-11.)

By the finding and order of Charles A. Burnett, Referee in Bankruptcy, which order was made on March 14, 1923 (R., 11-12), it appears that on May 27, 1922, Harry W. Voss, Trustee in Bankruptcy,

filed his amended verified petition, setting forth the value of the herein before mentioned real estate, showing that said Harold Taylor, Trustee, and Wilbur Erskine claimed an interest in said real estate, and denying such claims (R., 11-12).

On June 26, 1922, said Wilbur Erskine and Harold Taylor, Trustee, answered said amended petition setting up the wife's interest in the bankrupt's real estate under the Bankruptcy Act and the Statutes of Indiana at date of adjudication, and asked that the court fix the interest in said real estate owned by said Mary E. Erskine at the time of her death (R., 12). Petition of Harry E. Voss, Trustee in Bankruptcy, appears in the record at pages 22 and 23. (The said answer of your petitioners appears R., 23, 24.)

March 14, 1923, the Referee rendered judgment in favor of said Taylor, Trustee under the will, and ordered: That the said Harry W. Voss, Trustee in Bankruptcy, take nothing by his petition; that Harold Taylor, as Trustee under the will of Mary E. Erskine, deceased, was entitled to one-fifth of the proceeds of the sales of said real estate under the agreement herein before mentioned, and that said Harry W. Voss, Trustee in Bankruptcy, pay to Harold Taylor, Trustee, under the will of Mary E. Erskine, the sum of $7,374.00 (R., 11, 12).

A petition for review of such order by the District Court was filed with the Referee in Bankruptcy by Harry W. Voss, said Trustee in Bankruptcy, and the petition to review was certified to

the District Court of the United States for the District of Indiana on March 21, 1923 (R., 13-14). The order of the Referee in Bankruptcy, Charles A. Burnett, appears in the record at pages 25, 26 and 27.

Thereafter, on April 24, 1923, in the District Court of the United States for the District of Indiana, the said petition of Harry W. Voss, Trustee in Bankruptcy, for review of Referee's finding, was denied and the finding of the Referee in Bankruptcy approved (R., 14).

And thereafter, on June 18, 1923, said Voss, Trustee in Bankruptcy, as petitioner, appeared by counsel and filed in the United States Circuit Court of Appeals for the Seventh Circuit his certain petition to review and revise the order of the District Court, with certain exhibits "A", "B", "C" and "D" (R., b 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15).

Seasonably, on July 7, 1923, these petitioners, respondents below, appeared by counsel and filed their motion to dismiss said petition to review and revise, and stated as the grounds for such motion: (1) That no appeal had been asked for, granted or taken, and that the time for so doing was past; (2) that the question presented was a controversy arising in bankruptcy proceedings and reviewable only by appeal or writ of error and not by petition to review and revise; (3) that said petition was not filed within a reasonable time after entry of order in the District Court; (4) that petition did not suf-

ficiently or definitely state the matter of law sought to be reviewed; (5) that the petition did not correctly state the matter of law sought to be reviewed; (6) specifications of inaccuracies in statement of question; (7) that petition does not show that petitioner was injured or damaged; (8) that the inchoate interest of Mary E. Erskine in the real estate of her husband became a vested interest at the date of adjudication of bankruptcy; (9) that under the Bankruptcy Law and the statutes of Indiana the interest of Mary E. Erskine, the then living wife of the bankrupt, became an absolute estate, her separate property and did not pass to the trustee in bankruptcy; and (10) that by said law and statutes the inchoate interest of Mary E. Erskine became vested, on December 20, 1921, date of adjudication of bankruptcy, and at her death on March 21, 1922, said interest passed to Harold Taylor, Trustee, under her will.

The motion to dismiss the petition to review, of which the above is a digest, appears in the record. (R., 17, 18, 19.)

On September 11, 1923, said Voss, Trustee in Bankruptcy, filed in the Circuit Court of Appeals his petition asking an order of court to correct the record by the addition thereto of the Trustee's amended petition and certain other papers filed in the proceedings before the Referee in Bankruptcy, attaching certified copies of such papers to the petition. (R., 21.)

And on the same day, September 11, 1923, it was ordered by the United States Circuit Court of Appeals for the Seventh Circuit that, (1) the trustee's amended petition, (2) answer of Wilbur Erskine and Harold Taylor, Trustee, and (3) petition for review and assignment of errors (filed in the proceedings before the Referee) be made part of said petition to review and revise subject to motion to dismiss (R., 27-28).

The hearing in the Circuit Court of Appeals, on the petition to review and revise was set for Tuesday, January 8, 1924 (R., 28), and on that day parties were heard by counsel and the cause was taken under advisement (R., 29).

On June 20, 1924, the opinion of the United States Circuit Court of Appeals for the Seventh Circuit was filed in the office of the Clerk of that court (R., 30), and the opinion appears in the record (R., 30, 31, 32, 33, 34, 35 and 36).

On the same day it was ordered, adjudged and decreed that the order of the District Court be, and the same was, thereby reversed, and cause remanded (R., 37).

Thereafter, on July 3, 1924, the time for filing a petition for rehearing was extended fifteen (15) days from the time allowed by the rules of the court (R., 37), and to August 8, 1924 (R., 38).

On August 8, 1924, and within the time allowed by the court for filing the same, your petitioners, respondents below, duly filed in the Circuit Court of Appeals their petition for rehearing (R., 38). The petition for rehearing appears in the record (R., 39 to 51, both inclusive).

August 15, 1925, the Circuit Court of Appeals denied the petition for rehearing (R., 52).

March 2, 1925, this court granted petitioners' petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit (filed in this court November 10, 1924), the record already on file as an exhibit to the petition to stand as a return to the writ (R., 53).

ERRORS RELIED ON.

1. That the Circuit Court of Appeals erred in holding that the petition to review should not be dismissed because of the provisions of Section 4 of the Act of September 6, 1916 (39 U. S. Stats. at L., p. 727; Section 1649a, U. S. Compiled Stats. 1916).

2. That said Section 4 of the Act of September 6, 1916 (39 U. S. Stats. at L., p. 727; Sec. 1649a, U. S. Compiled Stats. 1916) is only intended to be corrective as to mistakes made in the two procedures named under the judicial code, namely: (a) writs of error, which is the procedure to be followed in obtaining appellate review in lawsuits; and (b) appeal, which is the procedure providing for obtaining

appellate review in equity procedure under the judicial code; that said Section 4 can not, by implication or judicial construction, be applied to statutory proceedings such as the petition to review and revise, under Section 24b of the bankruptcy act, and confined strictly to bankruptcy proceedings, and not applicable to controversies arising in bankruptcy, such as here involved, and which are reviewable only by appeal, under Section 24a of the bankruptcy act; and that the Circuit Court of Appeals was in error in construing said section to apply to petitions to review under Section 24b of the bankruptcy act.

3. That such ruling and decision of the Circuit Court of Appeals is in conflict with and contrary to ruling precedents of the Supreme Court of the United States applicable thereto, and in conflict with and contrary to the decisions of the United States Circuit Court of Appeals of other circuits.

4. That such ruling and decision of the Circuit Court of Appeals, if not in conflict with ruling decisions of the Supreme Court, is a new question never directly passed upon by this honorable court, and that a direct ruling by the Supreme Court is necessary to avoid conflicting decisions and rules of practice in the courts in different circuits of the United States.

5. That the Circuit Court of Appeals erred in overruling petitioners' motion to dismiss the trustee's petition to review and revise.

6. That the Circuit Court of Appeals erred in reversing the District Court.

7. That it was error to hold and decide that the rights of the wife in the real estate owned by the bankrupt did not vest in her as of the date of adjudication.

8. That it was error to hold and decide that upon the wife's death (subsequent to adjudication in bankruptcy and appointment and qualification of the trustee in bankruptcy) all her rights in this property were extinguished, and that no interest in the property passed to her trustee, in effect thus holding and deciding that no rights vested in the wife upon the adjudication, and that there was no interest in the property, therefore, to go to her estate, or to her husband surviving.

9. That the decision is in conflict with the decision of this honorable court, holding that under the bankruptcy act the wife's inchoate interest in her bankrupt husband's real estate does not pass to the trustee in bankruptcy and forms no part of the bankrupt's estate.

10. That the decision of the Circuit Court of Appeals is in conflict with ruling decisions of the United States Circuit Courts of Appeal in other circuits, holding and deciding that the wife's inchoate interest vests absolutely in her by operation of law as of date of the adjudication.

11. The decision of the Circuit Court of Appeals is in direct conflict with and ignores the ruling case in Indiana of *Harlin, Guardian, etc., v. American Trust Co., Trustee in Bankruptcy*, 67 Ind. App. 213, presenting this precise question, construing the Indiana statutes and declaring the wife's inchoate interest becomes vested in her as of date of the adjudication in bankruptcy and becomes part of her separate estate.

ARGUMENT.

The judgment to be reviewed is the judgment and decree of the Circuit Court of Appeals for the Seventh Circuit, reversing the order of the District Court of the United States for the District of Indiana, the order of the District Court having been to confirm the ruling and order of the Referee in Bankruptcy, holding that upon adjudication in bankruptcy of the husband, the wife then living and who was living with the husband, bankrupt, at the date of filing of the petition, adjudication and appointment of trustee, had become vested with a one-fifth interest in the real estate owned by her said husband, bankrupt, under and in accordance with the laws of the State of Indiana and the Federal bankruptcy act, and that said interest went to said Harold Taylor, as trustee under the will of said Mary E. Erskine, deceased, finding that the real estate had all been sold under an agreement, and the deeds joined in by said Taylor, Trustee, and by said Erskine, and directing the payment of her one-fifth interest to said Taylor, trustee, in the sum of $7,374.00.

The case was brought before the Circuit Court of Appeals for the Seventh Circuit upon petition of Voss, Trustee in Bankruptcy, to Review and Revise the order of the United States District Court.

Your petitioners, respondents below, seasonably filed motion to dismiss the petition to review and revise on the ground that this was an action arising in bankruptcy proceedings and could be brought to the Circuit Court of Appeals only on appeal under Section 24a of the Bankruptcy Act, whereas, the petition to review and revise was brought under Section 24b of the Bankruptcy Act.

It was conceded in the opinion of the Circuit Court of Appeals below that the case was not properly brought up to the Circuit Court of Appeals; that the petition to review and revise was improper procedure, and that the case should have been brought up upon appeal under Section 24a, and that the case would have to be dismissed, except for the provisions of Section 4 of an Act of September 6, 1916; 39 U. S. Stats. at L. 727; Sec. 1649a U. S. Comp. Stats. 1916.

The distinction between proceedings in bankruptcy and controversy in law and in equity, arising in the course of bankruptcy proceedings, briefly spoken of as controversies arising in bankruptcy proceedings, is clearly stated in the decision of the Circuit Court of Appeals for the Seventh Circuit, *In re Friend*, 134 Fed. 778, Opinion by Baker, J.:

> "That Section 23 * * * establishes a clear distinction between 'proceedings in bankruptcy' and 'controversies at law and in equity arising in the course of bankruptcy proceedings'; the former, broadly speaking, covering questions between the alleged bank-

courts have jurisdiction. The District Court did not have jurisdiction for the purpose of making partition of the real estate".

Citing:

Bardes v. Hawarden Bank, 178 U. S. 524;
First Natl. Bank, etc. v. Chicago, etc., Trust Co., 198 U. S. 280.

The Petition to Review and Revise Should Have Been Dismissed by the Circuit Court of Appeals for Want of Jurisdiction.

Of the errors relied on, numbers 1 to 5 inclusive, are on the subject of improper practice and are argued together.

The Circuit Court of Appeals in its opinion used the following language: "Where, as here, the record before us is in all respects the same as it would be on appeal." In so assuming the Circuit Court of Appeals erred both as to the record being the same, also as to it correcting the error in procedure.

In an appeal, there would be an order of the Circuit Court, or of the District Court, allowing an appeal, and a copy of the complete record of the District Court, duly certified to by the clerk of that court, under the seal of that court. Act of February 13, 1911, Chap. 47, Sec. 1; 36 Stat. at L. 901; U. S. Comp. S. Sec. 1656. Appendix 53.

In the instant case there is no such order of either court and no such certified transcript of the record.

This case came to the Circuit Court of Appeals on an original petition to review and revise, filed June 18, 1923, and the only paper filed in that court was said original petition, and accompanying exhibits. These exhibits did not constitute a transcript.

A petition to review and revise, resting as it does on whatever papers the petitioner chooses to file in the reviewing court, can not, under any construction, constitute a record on appeal, as required by Section 1656, U. S. Comp. S., cited *supra*. Pursuant to a motion, the court, on September 11, 1923, ordered that certain copies of portions of the record be made parts of the petition to review and revise. But the only thing filed in the office of the clerk of the Circuit Court of Appeals was a petition to review and revise, with certain exhibits. No transcript, no record was ever filed.

An appeal or a writ of error is before a reviewing court on the record of the court below. In the case of a petition to review and revise, the record is not taken to the appellate court.

The Circuit Court of Appeals erred in assuming, and in so stating in its opinion, that, "where, as here, (on petition to review and revise) the record before us is in all respects the same as it would be on appeal."

Prior to the adoption of the amendment of September 6, 1916, the Supreme Court had said that a petition to review and revise under Section 24b and an appeal under Section 24a were exclusive, and not

cumulative; that where a party had a right to review and revise under Section 24b, he did not also have a right to appeal under Section 24a. In the general law and equity practice frequently an appeal was taken when it should have been a writ of error, or writ of error taken when it should have been appeal. Sometimes these were very close questions. Sometimes the proper procedure, whether of equity or of law, presented very close cases. Evidently this was the situation intended to be covered by the amendment of September 6, 1916, to the Judicial Code—Section 4 referred to.

During this same period mistakes had been made in seeking to obtain reviews by petition instead of appeal, and the clear distinction between the two procedures had been pronounced by the Supreme Court, and followed by the various Circuit Courts of Appeal of the United States.

Congress must be presumed to have known of this situation and that they must use language to include the separate statutory procedure of petitions to review and revise provided for in the bankruptcy act, if they intended Section 4 of the Act of September 6, 1916, to cover and include petitions to review and revise in bankruptcy. Yet, no such language is found in any part of the law. First, it was entitled "An Act to amend the Judicial Code; to fix the time when annual terms of the Supreme Court shall commence and further to define the jurisdiction of that court." The express language of this amend-

ment includes only appeals and writs of error which are the only established methods of appellate procedure under the general judicial code.

If the Act of September 6, 1916, was intended to cover and protect against mistakes in the general appellate procedure under the general judicial code, how can judicial construction extend that meaning without any words to express it, to take in the statutory bankruptcy procedure of petitions to superintend and revise, with its special and even informal and summary procedure?"

Appeals in equity and writs of error in law serve the same purpose, in their respective procedures, to accomplish review in the appellate court and give practically the same jurisdiction involving law and facts; and they can well be used interchangeably; whereas the petition to review under the bankruptcy act presents only a question of law upon the particular facts stated in the petition.

The Bankruptcy Act in Sections 24a, 24b and 25a, provides three classifications of the questions arising in bankruptcy litigation and specifies the method by which a case in each class shall be carried to a higher court for review.

Questions germane to, arising in, and properly parts of bankruptcy proceedings are provided for by sections 24b and 25a. The former section, 24b, provides generally that questions of bankruptcy proceedings shall be carried up by petition to review and revise. The latter section, 25a, in a sense re-

moves from the operation of section 24b, three classes of questions. These three classes, while questions of bankruptcy which, but for Section 25a would be reviewable by petition, by Section 25a are made appealable. These three are: Action of the court in declaring or refusing to declare one a bankrupt; action of the court in discharging or refusing to discharge a bankrupt; and for allowances or refusal to make allowances of claims over $500. These three classes of cases, while of the same general class as those reviewable by petition under 24b, are removed from the general class, and made the subject of this special section, 25a, and are thus made reviewable by appeal.

The third section above referred to is Section 24a. This provides that all questions relating to controversies arising during the course of bankruptcy proceedings shall be taken up on appeal. It is conceded by the Circuit Court of Appeals in its opinion in the instant case that in this class fall controversies between the trustee and third-party claimants to property, etc., in the hands of the trustee. Such is the present case.

Although this is true, the respondent herein attempted to have this question reviewed by a petition to review and revise. It was your petitioners' position that the wrong remedy was pursued and that for that reason the Circuit Court of Appeals acquired no jurisdiction.

The Circuit Court of Appeals recognized the fact that the wrong remedy was pursued, but assumed jurisdiction on the grounds that Sec. 4 of the corrective statute of September 6, 1916 (39 Statutes at Large, p. 726; Comp. St. § 1649a) applies and corrects the mistaken remedy. This section, in harmony with the simplified forms under the various codes, provides that no case shall be dismissed for the reason that an appeal was prosecuted when the proper remedy was a writ of error, and that none should be dismissed when a writ of error was prosecuted when an appeal was the correct remedy. The Circuit Court cited no authority for this view, and all the decided cases since the passage of the act in question indicate that it was never intended to apply to bankruptcy proceedings, for which a separate code, in a sense, is provided.

Due to the uncertainty in the minds of many members of this bar, as to which is the proper remedy in a given case, it has been rather common practice, to go to the higher court, both by appeal, and by petition to review and revise. When this is done the practice is to dismiss the improper remedy, and to consider the case on the proper one. The following are cases where this was done, all of the cases being subsequent to the passage of the curative act:

In re Consumers' Packing Co. (1920), 268 Fed. 198;

Griffin v. Lenhart (1920), 266 Fed. 675, also 671;
Feder v. Goetz (1920), 264 Fed. 619;
In re Toole (1920), 250 Fed. 195;
In re H. L. Herbert & Co. (1920), 263 Fed. 351;
In re Wood (1921), 278 Fed. 355;
In re B. & B. Glove Corp. (1922), 279 Fed. 372;
Stokes v. Sedberry (1921), 275 Fed. 894;
Bear v. Liberty National Bank of Roanoke, Va. (1922), 285 Fed. 703, also 706;
National Discount Co. (1921), 272 Fed. 570;
In re Western Rope & Mfg. Co. (1923), 298 Fed. 926;
In re Geo. W. Cowen Co. (1923), 289 Fed. 192;
Blanke Mfg. Co. v. Craig (1923), 287 Fed. 345;
In re Rasmussen (1923), 287 Fed. 860;
Duncan v. Johnson & Co. (1925), 3 Fed. (2nd) 422;
In re L. M. Axle Co. (1925), 3 Fed. (2nd) 581;
People's Natl. Bank of Strasburg, Va., v. Green (1924), 296 Fed. 294;
Epley v. Baylor (1923) 293 Fed. 306;
Mohler v. Morris (1923), 291 Fed. 571;

In re Baltimore Pearl Hominy Co. (1925), 5 Fed. (2nd) 553;

In re Grotton Laundry Service, Inc. (1925) 5 Fed. (2nd) 63;

Goldstein v. Johnson (1925), 3 Fed. (2nd) 228.

In all of the above cases it is impliedly held that the two remedies, by appeal, and by petition to review and revise, are mutually exclusive, one of the other. In the following cases, it is expressly held that they are mutually exclusive:

In re Baltimore Pearl Hominy Co. (1925), 5 Fed. (2nd) 553;

In re Grotton Laundry Service, Inc. (1925), 5 Fed. (2nd) 63;

Goldstein v. Johnson (1925), 3 Fed. (2nd) 228;

In re B. & B. Glove Corp. (1922), 279 Fed. 372;

In re Parker (1921), 283 Fed. 404;

Duncan v. Johnson (1925), 3 Fed. (2nd) 422;

In re L. M. Axle Co. (1925), 3 Fed. (2nd) 581;

People's Natl. Bank of Strasburg, Va., v. Green (1924), 296 Fed. 294;

Eppley v. Baylor (1923), 293 Fed. 306;

National Discount Co. (1921), 272 Fed. 570.

The following cases, in their respective holdings, decide the question which was before the Circuit Court of Appeals, and in the light of these decisions, the Court of Appeals erred in assuming jurisdiction on petition to review and revise, of a question properly reviewable only by appeal.

The most recent case directly in point is that of *In re A. E. Richardson Co.* (1924), 3 Fed. (2nd) 600. The question sought to be reviewed was an order disallowing a claim of more than $500. By Section 25a such a question was made reviewable by appeal. Review was sought by a petition to review and revise. The petition was dismissed, the court holding that the question could be presented by appeal alone, and that petition was the wrong remedy.

In *In re Reilly* (1919), 258 Fed. 121, an appeal was taken from an order requiring a party to pay a bid made at a bankruptcy sale. The court held that the question should have been presented by petition; that appeal was the wrong remedy; and that the appeal must be dismissed.

In *Horton v. Mendelsohn* (1918), 249 Fed. 185, an appeal was taken from a rule to show cause why the petitioner should not be adjudged guilty of contempt. The court held that such a question could be presented only by petition under Section 24b, and the appeal was dismissed.

In *Frederick v. Silverman* (1918), 250 Fed. 75, by petition to review and revise, a turn over order was sought to be reviewed. The court held that such

order could be reviewed only by appeal and that therefore the petition would have to be dismissed.

In *In re Craig Lumber Co.* (1920), 266 Fed. 692, by a petition to review and revise, an allowance of a claim of over $500 was sought to be reviewed. The court held that such a question was appealable under Section 25a, and that appeal under that section was the exclusive remedy. The petition was dismissed.

A case in conflict with the holding of the Court of Appeals in the case at bar and one which can not be reconciled in any way is that of *In re Thompson* (1920), 264 Fed. 913. In that case the question was taken up both by appeal and by petition. The court first decided that the question was properly reviewable only by appeal. The appeal, however, had not been taken in time. For that reason the appeal was dismissed. The petition was dismissed because the matter was reviewable only by appeal. In that case, in spite of the fact that both remedies were pursued, the merits of the case were not passed upon, and for the reason, that the court recognized the fact that the remedies by appeal and by petition are mutually exclusive and are not interchangeable. If the curative statute by virtue of which the Court of Appeals assumed jurisdiction in the case at bar, is applicable to cases in bankruptcy, the court in that case would have held, that although the question was properly appealable, the court might acquire jurisdiction on petition, by virtue of the curative

statute. But the court did not do this. Both appeal and petition were dismissed, and the distinction between them was preserved.

In *Henkin v. Fousek* (1920), 267 Fed. 557, an appeal was taken to review a contempt order. The question was held reviewable only by petition, under Section 24b, and the appeal was dismissed for want of jurisdiction.

All of the cases above cited were decided after the enactment of the Act of Sept. 6, 1916, yet in not one of these cases was the act applied. In every case, save only the case at bar, the courts of the United States have uniformly held that where a question properly reviewable by petition is sought to be reviewed by appeal, the appeal must be dismissed and where a petition is improperly employed, it must be dismissed.

Ganzon v. Compania, 245 U. S. 86, holds that the differences between appeals and writs of error were not abolished by Section 4 of the Act of September 6, 1916, *supra.*

In *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, this court made clear and certain the distinction between appeals, as allowed under 24a, and petitions to review and revise, as under 24b. In that case it is held that a petition can not be treated as an appeal and the reason given is that on appeal the jurisdiction of the Circuit Court of Appeals is broader than on petition to review and revise.

This court, in *Matter of Loving*, 224 U. S. 183, held that where adverse interests, in bankruptcy, are involved, the question can not be reviewed by petition to review and revise. This case has been neither repealed, disapproved nor criticized. The decision of the United States Circuit Court of Appeals for the Seventh Circuit, in the case now being reviewed, is in conflict with that in the Matter of Loving, *supra*.

Vesting of Inchoate Interest of Wife, in Real Estate Owned by Bankrupt Husband, at Date of Adjudication.

The remaining errors relied on, numbers 6 to 11 inclusive, are on the merits, and are argued together.

What effect does the death of the wife, living at date of the adjudication in bankruptcy and appointment of the trustee in bankruptcy, have upon her dower or other marital interest in the lands of her bankrupt husband, presumed to have vested in her by operation of law as of the date of the adjudication under the provisions of the Bankruptcy Act, in a case in which the death of the wife takes place before any sale of the lands is made?

The District Court held that the inchoate interest of the wife having become a vested interest, an absolute estate, an unconditional and indefeasible

fee, it passed like her other separate estate, by the terms of her will, to Harold Taylor, her trustee.

The Circuit Court of Appeals in its opinion, said:

> "We are of opinion that on the death of the wife all her right in this property was extinguished."

The common law dower interest of a wife, which on the death of her husband ripened into a vested life estate in one-third of the real estate, has been abolished in Indiana (Sec. 3013 Burns' 1914, Sec. 2639 R. S. 1881), and in its place has been substituted what is known as the wife's inchoate interest, which, on the death of the husband ripens into a fee in one-third, one-fourth or one-fifth of the realty, depending on the quantum thereof. (Sec. 3014, Burns' 1914, Sec. 2640 R. S. 1881. Appendix 49-50.)

It is further provided by statute that this inchoate interest of the wife shall not be alienable or defeasible, except with her assent, and her assent thereto must be acknowledged in the form and manner prescribed by law. (Sec. 3037, Burns' 1914, Sec. 2660, R. S. 1881. Appendix 50.)

It is well settled, both in the Federal courts and in the state courts of Indiana, that the dower right or inchoate interest of a wife in the lands of her bankrupt husband does not pass to the trustee in bankruptcy.

Porter v. Lazear, 109 U. S. 84;

In re Hays (6th Circuit), 181 Fed. 674, 676;

Marine National Bank v. Swigert (6th Circuit), 262 Fed. 254;
Thomas v. Woods (*8th Circuit*), 173 Fed. 585;
Harlin, Guardian, v. American Trust Co., Trustee in Bankruptcy, 67 Ind. App. 213, 218.

In this case, it is the contention of your petitioners that the title to the real estate owned by the bankrupt on the date of adjudication, vested on that date, "by operation of law" to use the language of the Bankruptcy Act, in the trustee in bankruptcy, as to that interest in the land which the bankrupt could have conveyed, and that on that date, by the same "operation of law," there became vested in the wife, whatever inchoate interest she held, whether the quantum is defined by common law or by statute.

In the opinion of the Circuit Court of Appeals in the case at bar the Indiana Judicial Sales Act (Sec. 3052 Burns' 1914, Sec. 2669 R. S. 1881) is often referred to, and the judgment of that court rests on the theory that the inchoate interest of the wife could ripen into an absolute fee, only (1) on the death of her husband, or (2) on judicial sale. the death of her husband, or (2) on judicial sale, evidently meaning that it required an actual sale by the Trustee, and ignoring the provisions of 70a(5) that the title rests by operation of law as of date of adjudication; that the line of cleavage, when the rights of parties become fixed is the time of filing of the petition. Sec. 6 of the act.

White v. Stump, 266 U. S. 310, 313.

The question of the wife's right to her statutory interest is best solved by first determining what property and what title the trustee takes under sections 6 and 70a (5) of the Bankruptcy Act.

This Court early held that it was proper to recognize the State laws as to the wife's dower.

Hanover National Bank v. Moyses, 186 U. S. 181, 190.

By the Indiana statutes already quoted, the dower right is a fee simple one-third, which may be reduced to a one-fifth interest as against creditors where the real estate is of more than $20,000.00 in value.

The rule applies just the same to the question, regardless of whether a particular State law gives the wife the common law dower interest or the statutory one-third in fee, as in Indiana.

The case of *Hanover v. Moyses* has been followed and applied by Circuit Courts of Appeal in various Circuits.

Thomas v. Woods, 173 Fed. 585, 591;
In re Hayes, 181 Fed. 678.

The Bankruptcy Act is intended to administer the bankrupt's estate as it stood, and as the rights and interests, exemptions, dower and lien holders may stand at a particular point of time.

How long must a wife survive adjudication to enable her to claim her statutory interest? Would not such attempted construction make it a plain gamble in attempting to take, appraise and sell the

wife's interest? Such construction in every way violates the construction placed upon the Bankruptcy Act of this Court that there is a line of cleavage, a point of time, when the rights of the various parties and interests become fixed and are to be determined. And this is regardless of the Judicial Sales Act, which we contend was intended to apply to single sales upon executions, and under which single sales would be considered seaparately. Whereas the bankruptcy act is intended to be a general administration of the bankrupt's entire estate, as though he were *civiliter mortuus.*

That the bankrupt's interest in his lands passes to his trustee "by operation of law" under Section 70a of the Bankruptcy Act can not be disputed. It is anomalous that on adjudication of bankruptcy, two-thirds, three-fourths, or four-fifths of the lands of the bankrupt may pass "by operation of" the Bankruptcy "law," yet, the remaining one-third, one-fourth or one-fifth, reserved to the wife by the state statutes, does not pass to her.

What would be the status of that quantum of the realty, representing the wife's interest, if it did not vest on adjudication? It would not remain in the bankrupt, for all his interest passes to the Trustee. It does not pass to the Trustee, as is well settled. Surely none will argue that the fee would remain in abeyance because the law abhors such a situation of uncertainty.

A case strikingly similar to the one here being reviewed was recently considered by the Appellate

Court of Indiana. It arose in the case of *Harlin, Guardian, v. American Trust Company, Trustee, supra.* The facts involved were as follows: The bankrupt on date of adjudication owned certain realty. His wife had in no way conveyed or released her rights therein. She was subsequently put under guardianship, as an insane. The trustee was unable to sell that interest in the realty which passed to it on adjudication. Accordingly the trustee sued the wife's guardian for partition. There had been no sale. The court held: That the wife's inchoate interest is not affected by a judgment to which she was not a party; that the wife's inchoate interest becomes absolute *on adjudication of bankruptcy*, and that thereupon she is entitled to partition; and, that a sale is not necessary to make the wife's interest an absolute fee.

This case is the leading case on the subject in Indiana, and although cited to the Circuit Court of Appeals, it was not mentioned in that court's opinion. It is true that the case mentions the Judicial Sales Act, but it is also true, that the question decided was that on adjudication of bankruptcy, the wife's title became an absolute fee, *although there had been no sale.*

Clearly this case was disregarded by the Circuit Court of Appeals.

The United States Circuit Court of Appeals for the Seventh Circuit, by its judgment reversing the District Court, held that that portion of the proceeds of the sale of the realty, representing the wife's inchoate interest, did not pass to her.

The title to the real estate could have gone to but two persons—the trustee in bankruptcy or Mary E. Erskine, the wife of the bankrupt. If the wife of a bankrupt did not take the proceeds representing her inchoate interest, then these proceeds must have passed to the trustee in bankruptcy.

It is fundamental that the source of the title or interest which the trustee in bankruptcy takes is the bankruptcy act itself.

It is provided by Section 70a (5), Act July 1, 1898, c. 541; 30 Stats. at L. 565; U. S. Comp. Stats. 8654, that:

> "The trustee of a bankrupt, upon his appointment and qualification, shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all * * * property, which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him".

The only right or interest which the trustee in bankruptcy under any state of facts might claim in the real estate of the bankrupt is derived solely from the above quoted act.

It is specifically provided by Section 3037 Burns' Ind. Ann. Stats. 1914; Sec. 2660 R. S. 1881, that neither an act or conveyance of the husband without the assent of his wife, nor any sale, disposition, transfer or incumbrance of the husband's realty, nor any decree or execution to which she shall not be a party, shall prejudice or extinguish the inchoate rights of the wife in the realty of her husband.

Prior to adjudication of bankruptcy on December 20, 1921, Mary E. Erskine had joined in no conveyance of her husband's realty and by no act had she released or extinguished her inchoate right therein. Further, she was not a party in any way to the petition in bankruptcy of Wilbur Erskine, her husband.

It is held in *Higgins v. Ormsby* (1901), 156 Ind. 82, that a judgment against the husband on his sole debt or obligation does not constitute a lien on the inchoate interest of the wife in the realty of her husband.

By the provisions of the bankruptcy act herein above quoted the only property which vested in the trustee in bankruptcy is that property which prior to the filing of the petition in bankruptcy the bankrupt might have sold, or which might have been sold under execution against him. The Indiana statute just cited provides that the bankrupt by no act of his could have defeated the inchoate interest of his wife. The case of *Higgins v. Ormsby, supra*, holds that a judgment against the husband alone does not attach to the wife's inchoate interest.

By reason of the statute and by judicial decision the facts that a husband by his own act can not divest the wife's inchoate interest and that that interest can not be reached by a judgment and execution against the husband, are no longer open questions.

In view of this settled state of the law in Indiana, Section 70a (5) of the Bankruptcy Act above quoted, can only mean, when applied to the lands owned

by Wilbur Erskine on December 20, 1921, the date of adjudication of bankruptcy, that the trustee in bankruptcy Harry W. Voss did not take the inchoate interest held by Mary E. Erskine in those lands, for that interest was an interest which the bankrupt could not by any means have transferred prior to the filing of the petition, and which could not have been sold under judicial process against him.

Petitioners pray that the judgment of the Circuit Court of Appeals may be held void, and that a mandate be issued to the court below to set aside and vacate the judgment, and that the decision and judgment of the Circuit Court of Appeals in all things be reversed, and the judgment of the District Court affirmed, with costs to petitioners.

Respectfully submitted,

HAROLD TAYLOR,

DANIEL H. ORTMEYER,

Attorneys for Petitioners.

APPENDIX.

Act of January 28, 1915, chapt. 22, sec. 4; 38 Stats. at L. 804, as amended by the Act of September 6, 1916, chapt. 448, sec. 3; 39 Stat. at L. 727; U. S. Comp. Stats., sec. 1120a; (Jud. Code, Sec. 128, amended):

> "Judgments and decrees of the circuit courts of appeals in all proceedings and causes arising under 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; * * * and, also, in all causes arising under any amendment or supplement to any one of the aforementioned acts which has been heretofore or may hereafter be enacted, shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error."

Act of February 13, 1925, c. 229, sec. 14; 43 Stats. at L. 941:

> "That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

Act of September 6, 1916, c. 448, sec. 4; 39 Stats. at L. 727; U. S. Comp. Stats., sec. 1649a:

> "No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

Act of July 1, 1898, c. 541, sec. 24a; 30 Stats. at L. 553; U. S. Comp. Stats., sec. 9608:

> "The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia."

Act of July 1, 1898, c. 541, sec. 24b; 30 Stats. at L. 553; U. S. Comp. Stats., sec. 9608:

> "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their ju-

risdiction. Such power shall be exercised on due notice and petition by any party aggrieved"

Act of July 1, 1898, c. 541, sec. 25a; 30 Stats. at L. 553; U. S. Comp. Stats., sec. 9608:

> "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, towit:
>
> (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;
>
> (2) From a judgment granting or denying discharge; and
>
> (3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over.
>
> Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

Act of July 1, 1898, c. 541, sec. 70a; 30 Stats. at L. 565; amended February 5, 1903, c. 487, sec. 16; 32 Stats. at L. 800; U. S. Comp. Stats. 9654:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to

his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 3013, Burns' Ind. Ann. Stats. 1914; Sec. 2639 R. S. 1881:

"Tenancies by the courtesy and in dower are hereby abolished."

Section 3014, Burns' Ind. Ann. Stats. 1914; Sec. 2640 R. S. 1881:

"If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors: Provided, however, That

where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors."

Section 3029, Burns' Ind. Ann. Stat. 1914; Sec. 2652 R. S. 1881 :

"A surviving wife is entitled, except as in section 17 (Sec. 2483) excepted, to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions."

Section 3037, Burns' Ind. Ann. Stats. 1914; Sec. 2660 R. S. 1881:

"No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

Section 2864, Burns' Ind. Ann. Stats. 1914; Sec. 2502 R. S. 1881:

> "If the decedent leave a widow, and the real estate owned by him at his death shall not exceed ten thousand dollars in value, the court shall direct the sale of the undivided two-thirds parts thereof for the payment of said debts and liabilities; and if the value thereof exceed ten thousand dollars, and do not exceed twenty thousand dollars, the court shall order the sale of the undivided three-fourths thereof; and, if it exceed in value twenty thousand dollars, the undivided four-fifths thereof, for said purpose."

Section 3052, Burns' Ind. Ann. Stats. 1914; Sec. 2669 R. S. 1881:

> "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wfe in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs, or assigns, subject to the provisions of this act, and not otherwise. When such inchoate right shall become vested under the provisions of this act, such wife shall have the right to the immediate possession thereof; and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon

demand, without the payment of rent, have the same setoff to her."

Section 3053, Burns' Ind. Ann. Stats. 1914; Sec. 2670 R. S. 1881:

"When not applicable—The provisions of this act shall not apply to sales of real estate upon judgments rendered prior to the taking effect of this act; nor to any sale of real property of the value of twenty thousand dollars and over; nor to the sale of such real property of the aggregate value of twenty thousand dollars and over—except so much of such real property as shall not exceed in value the sum of twenty thousand dollars."

Section 3054, Burns' Ind. Ann. Stats. 1914; Sec. 2671 R. S. 1881:

"Who inherits from wife.—If any married woman shall die, holding real property vested in her by the provisions of this act, during the existence of the marriage in virtue of which she received the same, the whole of such real property shall descend to her surviving husband; and if any woman shall marry a second or any subsequent time, holding real property vested in her by the provisions of this act, such woman may not, during such second or subsequent marriage, either with or without the assent of her husband, alienate such real estate; and if, during such marriage, such wife shall die, such real estate shall descend to her children by the marriage in virtue of which such real estate came to her, if any there be."

Section 3055, Burns' Ind. Ann. Stats. 1914; Sec. 2672 R. S. 1881:

> "Price on execution sale.—No real property in which any married woman holds such inchoate interest as is provided for in this act, liable to be sold with benefit of appraisement laws of the state, shall be sold on any execution or order of sale issued out of any court for less than four-ninths of the appraised cash value thereof, exclusive of liens and incumbrances."

Act of February 13, 1911, c. 47, Sec. 1, 36 Stat. at L., 901 U. S. Comp. Stat., Sec. 1656.

> "Printed transcript of record on appeal to circuit court of appeals—In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: Provided, That either the

court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required."

Office Supreme Court, U. S.
FILED
NOV 28 1924
STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924. 1925

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF

MARY E. ERSKINE, DECEASED,
WILBUR ERSKINE,

Petitioners,

vs.

HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,

Respondent.

No. 730 199

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES T. WALKER,
HENRY B. WALKER,
Counsel for Respondents.

INDEX

	Page
Brief in Opposition to Petition	1
Jurisdiction of Supreme Court	2
Wife's Interest	6
Procedure	8
Opinion of Circuit Court of Appeals	13

CASES CITED.

Acretelli, In re, 173 Fed. 121, 21 ABR 537	8
Act of Feb. 13, 1911, 36 Stat. L. 901	11
Act of Feb. 26, 1919, 40 Stat. L. 1181	12
Act of Sept. 6, 1916, 39 State. L. 727, Secfl 1549a U. S. Comp. St. 1916	9, 15
Act of Sept. 24, 1789, 1 Stat. L. 91	11
Ana Maria S. Co. v. Quinones, 253 U. S. 247, 41 S. Ct. 110	11
Bank v. Sherman, 101 U. S. 403	17
Bondholders v. Toledo D. & B. R. Co., 62 Fed. 166	3
Breyer Ptg. Co.(In re, 216 Fed. 878	14, 14
Burr Mfg. Co., In re, 215 Fed. 898, 132 C. C. A. 238	11
Central Trust Co. v. Grant Loc. Wks., 135 U. S., 207	3
Chase v. Van Meter, 140 Ind. 321	6, 20
Coder v. Arts, 213 U. S. 223	13, 14
Cutting v. Van Fleet, 252 Fed. 100	10
Davis v. Kelly, 179 Ind. 13, 93 N. E. 336	7, 18
Dayton C. & I. Co., In re, 291 Fed. 390	17
Essgee Co. v. U. S., 262 U. S. 151, 43 S. Ct. 154	10
Fry v. Hare, 166 Ind. 415	6, 20
Gauzon v. Compania Gen. etc., 245 U. S. 86, 38 S. Ct. 46	9
Goldstein, In re, 216 Fed. 887	14, 15
Hardin Gdn. v. Amer. Trust Co., 67 Ind. App. 213	5
Hermanos v. Costa, 281 Fed. 439	10
Hersey, In re, 1 Fed. (2nd) 5	12
Hickling v. Sherman, 101 U. S. 403	17
Howard v. Leete, 257 Fed. 918	10
Kelly v. Minor, 252 Fed. 115	8

Lawson v. Debolt, 78 Ind. 563.....**6, 7, 20**
Loving, In re, 222 U. S. 183, 56 L. ed. 725..... **10**
Mattill v. Bass, 89 Ind. 220..... **7**
Nassau S&R Wks. v. Brightwood Bronze Fdy. Co., U. S. **18**
Ohio Farmers Ins. Co. v. Bevis, 18 Ind. App. 17..... **8**
Petronia, In re, 220 Fed. 269.....**14, 15**
Platner v. Sherwood, 6 Johns. Ch. (N. Y.), 118..... **17**
Porter v. Lazear, 109 U. S. 84..... **18**
Railway Co. v. Heck, 102 U. S. 120..... **3**
Roberts v. Shroyer, 68 Ind. 64..... **2**
Simkins Federal Practice, 879..... **2**
Slack, In re, 111 Fed. 523, 7 ABR 121..... **8**
Solu v. Scintron, etc., 237 Fed. 61..... **9**
Steins v. Franklin Co., 14 Wall. 15..... **3**
Swiftwater Co. v. Davis, 287 Fed. 813..... **10**
Thomas v. Woods, 173 Fed. 585, 19 Ann. Cas. 1080.... **8**
Toyotisen Kaisha v. Hartmann, 253 Fed. 422..... **10**
Wilson v. Union T. Co., 265 Fed. 669..... **10**
Wright v. Gelvin, 85 Ind. 128.....**6, 20**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, WILBUR ERSKINE,

Petitioners,

vs.

HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,

Respondent.

No. 720

A writ of certiorari will issue from the Supreme Court only where questions of gravity or importance or great public concern are involved. It will issue where questions of international importance are involved; where there is a difference of opinion between different Circuits of Appeal; where there is a conflict as to large property rights between the decisions of a Circuit Court of Appeals and a State Supreme Court in the same circuit; and where there is a question as to the disqualification of a judge of the Circuit Court of Appeals to sit in the case. The honorable judges of this court know far better than the authors of this brief the type and class of cases which they will bring before them by certiorari. Needless to say, it is only a case of the most extreme importance which will be considered by the Supreme Court of the United States on writs of certiorari to the Circuit Court of Appeals, especially in cases where the Circuit Court of Appeals is made the court of last resort.

May we first call the court's attention to the fact that this petition for writ of certiorari was filed November 10, 1924; that the opinion of the United States Circuit Court of Appeals in this case was handed down on June 20, 1924. On August 8, 1924, the petitioners filed in the Circuit Court of Appeals a petition for rehearing, and on August 15, a journal entry was made by the order of the Circuit Court of Appeals as follows:

"It is ordered by the Court that the petition for rehearing in this cause be, and the same is hereby denied."

We wish for this court to note that the petition for writ of certiorari was not filed within three months of the order of the Circuit Court of Appeals which reversed and remanded the order of the District Court. We are well aware of the rule and decisions which interpret that rule, to the effect that in case of a petition for rehearing in a State Supreme Court and a subsequent petition to the United States Supreme Court for a writ of certiorari, that the time will date from the order denying the petition for rehearing. Furthermore, we are aware of the rulings that if the petition for rehearing in the Circuit Court of Appeals is filed and "*entertained*" by that Court, the time for filing a petition for writ of certiorari dates from the denial of the petition for rehearing. We urge, however, that in the case at bar the Circuit Court of Appeals did not "*entertain*" the petition for rehearing made by the petitioners herein.

Again it may be noted that the petition for rehearing was filed on the 8th day of August and it was up to the Circuit Court of Appeals to dispose of that petition in some manner. Without waiting for briefs to be filed in opposition thereto, and as we contend, without "*entertaining*" this petition, it was denied by an order as heretofore quoted.

There is nothing in the record to show anything except the filing and denial of the motion. "Entertainment" should certainly include some serious consideration, or at least, that as to the matter raised in the motion which was an error in Law, there had been no argument on that particular point.

Simkins Federal Practice, 879.

It is maintained here that the petitioner had a choice of procedure and availed himself of the petition for rehearing. This was denied in ample time to have taken advantage of his other rights had he then cared to do so.

Bondholders vs. Toledo D. & B. R. Co., 62 Fed. 166.

It is believed that if the petition for rehearing in every essential is not brought within the rules under which such petitions may be granted, the action by the court in denying such petition without any further showing may not be an "entertainment" of the petition.

May it also be noted that the petitioners herein had ample time to file their petition for a writ of certiorari after the denial of their petition for rehearing and within the three month period as prescribed by the Statutes (Sec. 6 Act of Sept. 6, 1916) ; that in other words if our position is well taken, a petition for writ of certiorari should have been filed on or before September 20, 1924, and these petitioners had from August 15, to September 20 in which to do this, and having failed we suggest to this Honorable Court that it has no jurisdiction of this cause by virtue of the Statute cited above.

This court is not asked to review the order denying the petition for rehearing, but to review the original order which was final when entered. The analogy to a motion for a new trial, which has been made, is not borne out in the case at bar, for in such a case the appeal or review is taken from the action of the court overruling the motion for a new trial.

Steines vs. Franklin Co., 14 Wall. 15.
Railway Co. vs. Heck, 102 U. S. 120.
Central Trust Co. vs. Grant Loc. Wks., 135 U. S. 207.

It is now urged that unless this court enlarges the meaning of the Statute which permits a writ of certiorari to issue if the petition is filed within three months "*after entry of the judgment or order*" that petitioners are here seeking such writ too late.

The petitioners have attempted to suggest to this court that there is a conflict between various Circuit Courts of Appeal upon the question involved, and also that there is a conflict between the Circuit Court of Appeals and the Court of last resort in the State of Indiana. We contravert both of these suggestions.

The laws on the subject of dower and the interest of a widow in the real estate of her husband applying in the various states are many and varied.

The Courts have held time and time again that in order for the bankruptcy law to be of uniform operation throughout the United States does not mean that laws of exemption, laws relating to dower and the interest of the widow or wife in her husband's property, as enacted by the various states, shall be the same or applied in the same manner by the bankruptcy court. In other words, the bankruptcy act is of uniform operation throughout the United States even though the bankruptcy courts follow the laws of the several states in certain particular instances, such as those relating to liens, exemption and dower. Therefore, the opinion and decision of the Circuit Court of Appeals of the judicial circuit in which the State of Indiana is located is the only Court of Appeals which can determine and pass upon the question involving the interest of a wife or widow in her husband's real estate in Indiana, and any opinion or decision of any other Circuit Court of Appeals can not be in conflict with the opinion or decision of the Circuit Court of Appeals for the circuit in which the State of Indiana is located, because the construction of the statutes of the State of Indiana would not be involved.

On the other proposition, that is, that there is a conflict between the court of last resort in the State of Indiana and the Circuit Court of Appeals of the judicial district in which the State of Indiana is located, this Honorable Court's attention is called to the fact first, that the case cited by petitioners is not a decision by the Supreme Court of the State of Indiana, and that the Appellate Court of the State of Indiana is not a court of last resort in that State; and in the second place, it is suggested that the petitioners themselves in their brief to the Circuit Court of Appeals

(and the Circuit Court of Appeals as shown by their opinion relied upon the brief) stated that this particular decision of the Indiana Appellate Court and the questions therein involved did not apply to the case at bar. This case cited by petitioners, *Hardin, Guardian vs. American Trust Company*, 67 Ind. App. 213, involved the construction of the Judicial Sales Act of 1875. May we quote from petitioners' (respondents below) original brief in this cause, especially on page 6,

> "The general statutes of descent which fix the wife's inchoate interest are found in Sections 2864, 3014, 3027, 3029 R. S. Indiana, 1914. Sections 3052, 3053, and 3054, which are the sections referred to by petitioner, constitute *the Judicial Sales Act of 1875* and *relate to a special subject and to meet a special situation distinguished from the question in the present case.*
>
> "Respondent's position is that whatever title the Trustee in Bankruptcy took became vested by operation of law (not as by judicial sale) as of the date of the adjudication in Bankruptcy. That at the same time the wife's inchoate interest by operation of law became vested. That thereafter the Trustee of the bankrupt and the bankrupt's wife were the same as tenants in common, each holding their respective rights. That either could have instituted a suit for partition or could have conveyed their respective undivided shares, so far as the lawful rights of either were concerned.
>
> "The petitioner does not state the position of the respondent. *There is not now and never has been any claim by the respondent either before the Referee or the District Court that the respondent's decedent took any title as by judicial sale or under the special judicial sale Act of '75.*
>
> "*The respondent herein does not claim, as asserted in petitioner's brief, that his decedent took her title to one-fifth of said real estate by virtue of the judicial sales act of 1875, the same being an act designed to effect strict judicial sales.* Acts 1875, p. 178, Burns' R. S. 1914, Sections 3052-3055.

"Respondent affirms, on the contrary, that the rights and interests of his decedent in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the State of Indiana, being Sections 2964, 3014, 3029 and 3037, Burns' R. S. 1914."

Furthermore the respondents say on page 12 of their original brief:

Accordingly we submit that the Judicial Sales Act of 1875, does not apply to the instant case."

The Circuit Court of Appeals may be quoted in this regard as follows:

"Respondent Taylor, Trustee, repudiates the suggestion of the petitioners that he claims any title under the Indiana Judicial Sales Act of 1875." (Section 3052 and 3055, page 178 Burns 1914).

Any fault which the petitioners may be able to find with the opinion of the Court below in this regard is their own and cannot be laid upon the Circuit Court of Appeals; and the petitioners should not now in this court be allowed to claim any rights which they have heretofore expressly repudiated and refused.

The petitioners have gone into the merits of this case in their petition, and therefore we wish briefly to answer the points made by them.

In the first place, the interest of a wife in her husband's real estate, is conditional, depending upon her survivorship.

Fry vs. Hare, 166 Ind. 415, 420.

There is an exception though, and that is in cases of Judicial Sales, and then the Act of 1875 (Sec. 3052, 3053, 3054 and 3055 of Burns' Revised Statutes of 1914) applies.

Chase vs. Van Meter, 140 Ind. 321.
Wright vs. Gelvin, 85 Ind. 128.
Lawson vs. DeBolt, 78 Ind. 563, 564.

The second section of the Judicial Sales Act of 1875 shows reason for the respondents' willingness to repudiate any claim under this act, because that section provides that the provisions of this act shall not apply to sale of real prop-

erty of the value of $20,000 and over. And the respondents elected to claim an interest in real property over the value of $20,000.

The Judicial Sales Act (Act of 1875) is a very practical law. Prior to it, the purchaser at a sale of a husband's interest purchased that interest together with a possibility of a greater interest—that greater interest ripening upon the husband's survivorship of his wife—and for which additional possible interest he actually gave no consideration. The husband's interest would bring as much without this possible increase as with it. The setting apart under the Judicial Sales Act the wife's interest gave that interest a real value. "The evident purpose of the act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in the case of Judicial Sales."

Davis vs. Kelly, 179 Ind. 13, 97 N. E. 336.

In the case of *Lawson vs. DeBolt*, 78 Ind. 563, the husband made a voluntary assignment and the assignee sold the debtor's real estate. The court said in that case that "The sale by the assignee and confirmed by the court, was a judicial sale." The court did not say that the *assignment* by the debtor was a judicial sale.

And the same is true in the cases of bankruptcy prior to the Act of 1898. Those cases decide that the adjudication in bankruptcy together with the transfer or conveyance by the register in bankruptcy to the assignee in bankruptcy was a judicial sale. Those cases did not hold that the adjudication itself was a judicial sale.

Roberts vs. Shroyer, 68 Ind. 64.
Mattill vs. Bass, 89 Ind. 220.

The only way in which a bankrupt's wife's inchoate interest may be hastened is by a judicial sale. We urge that there could be no judicial sale until the actual trustee's sale by order of the bankruptcy court, at which time the bankrupt's wife would be entitled to have her inchoate interest set off.

In some jurisdictions, and in Indiana, but for the Judicial Sales Act, it is possible for the Trustee in Bankruptcy to sell the real estate of the bankrupt subject to the wife's

interest, or it is possible to set apart to the wife, the interest in the lands of her husband to which she would be entitled by virtue of the laws of the state, which vest an interest in the wife when said lands are sold at judicial sales and create an unconditional title to the purchaser as to the remainder.

It has been held that the inchoate right of dower is unimpaired, and the Trustee in Bankruptcy takes the property of the bankrupt subject to the right of the widow to dower becoming consummate through the bankrupt's death.

Kelley vs. Miner, 252 Fed. 115.

Thomas vs. Woods, 173 Fed. 585, 19 Ann. Cas. 1080.

In re Slack, 111 Fed. 523, 7 A. B. R. 121.

In re Acretelli, 173 Fed. 121, 21 A. B. R. 537.

If such inchoate interest of the wife can never become consummate because of the wife's death prior to the death of the husband, it seems that the Trustee in Bankruptcy should be able to convey an absolute title to all the real estate of the bankrupt, just as the bankrupt himself before bankruptcy could have done in case the wife had not joined in the conveyance and subsequently died before his death.

Ohio Farmers Insurance Co. vs. Bevis, 18 Ind. App. 17.

Therefore, it is urged that the Trustee in Bankruptcy is entitled to the proceeds of the sale of such real estate and that on the merits of the case petitioners, if granted a writ of certiorari, cannot secure a reversal.

In the petitioners' brief emphasis has been laid upon the proposition that the respondent's original petition to review and revise to the Circuit Court of Appeals, should have been dismissed, inasmuch as respondent herein failed to follow the proper appellate procedure. Although the court below found that the proper procedure was not followed, respondent here does not concede that point and only refrains from arguing it here because it believes it is not proper at this time. If counsel for respondent did misconceive the proper appellate procedure, it is now urged that this Honorable Court follow the opinion of the Circuit Court of Appeals below, that Congress, by the Act of September 6, 1916, at Section 4 thereof (39 Stat. L. 727) attempted to remedy such mistakes.

It is urged that the Circuit Court of Appeals properly construed said section which is as follows:

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out. But when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed. (Sec 4 of the Act of September 6, 1916, 39 Stat. L. 727, Sec. 1549a, U. S. Comp. Stats. 1916)." ,

In the case of *Solu vs. Scintron and Aboy*, 237 Fed. 61, this section was construed and the court said, "In a case where the only difference between the two modes of seeking review is formal and where none of the substantial reasons for distinction between writs of error and appeals exist, we may properly disregard the objection. We will therefore proceed to consider the case on the merits."

The term "petition to review and revise" if added to the above quotation would only carry out the apparent legislative intent.

"This section does not abolish the distinction between writs of error and appeals but only requires that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review."

> *Gauzon vs. Compania General, etc.*, (1917) 245 U. S. 86, 38 S. Ct. 46.

In a petition to review and revise, only questions of law may be determined or brought before the Appellate Court. The respondent herein sought by his petition to review and revise nothing additional than a decision of a legal question. If he had proceeded by an appeal or writ of error to the Circuit Court of Appeals, rather than by a petition to review and revise, the question would have been one of law just the same, as nothing else is involved in this case. The matter was before the court on an agreed statement of facts and the entire record was before the court.

In the case cited by petitioners, *In re Loving*, 224 U. S. 183, 56 Law Ed. 725, which was decided in 1912, and prior to the enactment of the section herein involved, the court said in its opinion that the object of Section 24b of the Bankruptcy Act of 1898 is to give a review as to matters of law where facts are not in controversy. Such was the situation in the case at bar.

Furthermore the Supreme Court has held in construing Section 4 of the Act of September 6, 1916, that the purpose of said act was to discourage the necessity for abundant caution and to secure economy in the time of the courts and in making up and printing records. Mr. Chief Justice Taft said in the case of *In Essgee Co. vs. U. S.*, (1923), 262 U. S. 151, 43 S. Ct. 154, "Since the passage of the Act of September 6, 1916, which provides that no court having power to review a judgment or decree passed by another court shall dismiss an appeal because a writ should have been sued out, but that when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper Appellate procedure had been followed. The distinction is not important from the standpoint of the jurisdiction of this court. In the interest, however, of orderly procedure economy in time of both courts and in the making up and printing of the record, counsel should make every effort to select the proper procedure in review and not duplicate methods, out of abundant caution which the Act of 1916 makes unnecessary."

This section has been repeatedly upheld and in that regard may we cite the following cases:

Sucesores de Pyres Hermanos vs. Costa, (1922), 281 Fed. 439.

Swiftwater Plantations Co. vs. Davis, (1923), 287 Fed. 813.

Toyotisen Kaisha vs. Hartmann, (1918), 253 Fed. 422.

Cutting vs. Van Fleet, (1918), 252 Fed. 100.

Howard vs. Leete, (1919), 257 Fed. 918, 922.

Wilson vs. Union Tool Co., (1920), 265 Fed. 669.

The distinction between the various modes of appellate procedure are not abolished by this section, and the rights which an appellant would have under the proper procedure are given him although the procedure itself was improper.

Ana Maria Sugar Co. vs. Quinones, (1920), 253 U. S. 247, 41 S. Ct. 110.

Section 1 of the Act of February 13, 1911, Chap. 47 (36 Stat. L. 901) provides for printed transcripts in cases of appeals or writs of error, although the act referred to mentions only reviews by writ or error or appeal, *petitions to review under section 24b* of the Bankruptcy Act of 1898 are held to be the equivalent of an appeal for the purposes of this statute.

In re Burr Mfg. Co., 215 Fed. 898, 132 C. C. A. 238.

In construing the words "petition to review and revise" to be included within the terms "writ of error" or "appeal" in one case, a precedent has been set for such a construction of the act now in question.

The Circuit Court of Appeals in the case at bar included the term "petition to review and revise" within the meaning of the terms "writ of error" or "appeal", and it is respectfully urged that it did so properly.

The court's attention is called to other provisions of the United States laws. The first is the Act of September 24, 1789, 1 Stat. L. 91:

"No summons, writ, declaration, return, process, judgment, *or other proceedings in civil causes*, in any court of the United States, shall be abated, arrested, quashed, or reversed *for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect*, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The second is the Act of February 26, 1919, Chap. 48, 40 Stat. L. 1181, which is an amendment to Section 269 of the Act of March 3, 1911. This section shows the trend of Congress in regard to provisions providing against jeofails. This act reads as follows:

"All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The Act of September 24, 1789, Section 4 of the Act of September 6, 1916, and the Act of February 26, 1919, read together show the decided attitude of Congress toward technicalities in the courts and these statutes show the legislative intention to alleviate in all ways possible the effects of misconceived remedies and technical errors. These sections show, also, that Congress expects the Federal Courts to give substantial justice in every case, and not render decisions which will penalize litigants for technical mistakes made by their counsel.

The bankruptcy texts cite scores of cases where in order to be safe, litigants have sought a review in the Circuit Court of Appeals by appeal and also petitions to review and revise, and many instances are given where the courts indicated that they were in doubt as to which was the proper remedy. On numerous occasions the courts have properly passed upon the merits of the case before them without any question although the method of obtaining jurisdiction for the review is clearly wrong as they have done in

In re Hersey, 1 Fed. 2nd p. 5. (Advance Sheets, Nov. 13, 1924).

which has just come to respondent's attention.

Congress has always sought to obviate the miscarriage of justice to unfortunate litigants who have misconceived their method of seeking a review. Any one of the three Acts of Congress set out in this brief can, if broadly con-

strued, amply justify the decision of the court below. For the convenience of this Honorable Court we set out the opinion of the Circuit Court of Appeals sought to be reviewed here by the writ prayed for. There is no argument which can be made by counsel which may sustain it which is equal to the arguments set out in the opinion itself.

Before Alschuler, Evans and Page, Circuit Judges.

Opinion of Page, Cir. J.

Wilbur Erskine, on December 20, 1921, when adjudicated a bankrupt, was a resident of the state of Indiana, and was married to his first wife, who died March 21, 1922, survived by her husband and two children.

Before the filing of the petition and adjudication, bankrupt owned, in fee simple, a considerable amount of real estate. His wife left a last will and testament, naming respondent Taylor trustee thereunder. Petitioner Voss was elected trustee of the bankrupt estate.

After the death of the wife, who had never joined in any conveyance, the real estate was sold, by stipulation between petitioner, respondent and bankrupt, all parties joining in the deeds.

The rights of respondent, as trustee under the will, were, by agreement of all of the parties, submitted to the court in bankruptcy, and its holding was favorable to the claim of respondent and bankrupt that, upon the filing of the petition and the adjudication in bankruptcy, the wife became vested with the same rights in the estate of the bankrupt that she would have had thereunder had she survived her husband.

This case is brought here by petition to review and revise, and a motion is made to dismiss on the ground that the case should have been brought here by appeal.

In support of his contention that this case is properly before this court on a petition to review and revise, petitioner's main reliance is upon *Coder vs. Arts*, 213 U. S. 223. Because of the difference between the facts in that case and the case at bar, it is inapplicable here to support petitioner's contention, in that case, a creditor filed his claim, and it was allowed in bankruptcy. In connection therewith, and

as a part thereof, he asked for priority, and the court held that the claim for priority was merely incident to the allowance of the claim. In the case at bar, respondent is not a creditor and is not seeking the allowance of a claim, as such. The same thing that respondent and bankrupt are seeking to do is to have carved out and set aside to them, as their property, free from administration in bankruptcy, a very considerable portion of the property which would otherwise be administered in bankruptcy and distributed to creditors.

This court in *re Breyer Printing Co.*, 216 Fed. 878, pointed out so clearly the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings" that it will serve no good purpose to add to what was there said. We there also discussed *Coder vs. Arts, supra*, and other leading cases wherein there is pointed out the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings."

> It seems clear, under the facts in the instant case, that "between the *trustee representing the bankrupt and his general creditors, as such, on the one hand, and ading property in the possession of the *trustee* to be litigated in appropriate plenary suits, and not affectverse claimants" (respondents) "on the other, concerning directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors."
>
> This is the language in *re Breyer Printing Co., supra.*

Counsel for petitioner rely upon *In re Petronio*, 220 Fed. 269, in which we held that the proceeding in the district court was of a summary nature, citing *In re Goldstein*, 216 Fed. 887, 889, and *In re Breyer Printing Co., supra.* In the Goldstein Case, after distinguishing between summary and plenary methods of proceedure, we said:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable.* A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the Dis-

trict Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

That was a petition to review and revise, which raised only the question of the jurisdiction of the court to enter any order other than one of dismissal, after it was ascertained that there was a claim to property that was not merely colorable. The Petronio Case is of like character. There the District Court, in the face of the fact that its jurisdiction was disputed, and the further fact that a substantial and not a colorable claim was set up, proceeded to adjudicate the matter in a summary way, and therefore, both the Petronio and Goldstein Cases were reviews of summary orders in bankruptcy.

The other authorities cited by petitioner are in harmony with the authorities here cited.

The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the parties can not affect the method of procedure to procure a review.

For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an act of September 6, 1916 (39 U. S. Stats. at L. p. 727; Sec. 1649a U. S. Compiled Stats. 1916):

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in

bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, supra, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with the appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms "appeal" and "writ of error" should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, especially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal.

Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana judicial sales act of 1875 (Secs. 3052 and 3055, page 178, Burns, 1914), but asserts,

> "That the rights and interests of his decedent" (Mary E. Erskine) "in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the state of Indiana, being Sections 3014, 3029, 3037 and 2864, Burns' 1914," (being, respectively, Secs. 17, 27 and 35 of Act of 1852, regulating descents, and Sec. 122 of the Decedents' Estates Act of 1881, for the settlement and distribution of estates).*

What respondent's argument means by a vesting upon adjudication by operation of law seems to be based upon three things: (a) That under Section 75 a (5) of the Bankruptcy Act, the inchoate right of dower of the wife does not pass to the trustee; (b) That upon adjudication "So far as the bankrupt's property was concerned, after the adjudication, he was, as it were, *civiliter mortuus*. His rights in the property were the same as though he were dead."; (c) That, by reason of *a* and *b*, there was vested absolutely in the constructive widow all of the rights that she would have had as

(a) May be conceded.

In *Bank vs. Sherman and Hickling vs. Sherman*, 101 U. S. 403, relied upon in support of proposition *b*, dower rights were not involved, but the court, commencing upon the effect of filing petition in bankruptcy, said:

> "The filing of the petition was a *caveat to* all the world. ** Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. ** If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus*."

We think that what was said *in re Dayton Coal & Iron Co.*, 291 Fed. 390, as to a part of the above quotations is reasonably applicable to all of it. The statement, "The bankrupt became, as it were, for many purposes, *civiliter mortuus*," we think is said more as an illustration than as a judicial determination, and certainly should not be held to have any influence on the determination of the issue in this case. In *Platner vs. Sherwood*, 6 Johnson's Chancery Reports (N. Y.) 118, 123, it is said:

> "But the *civil death* spoken of in the books, is of two kinds: 1. Where there is a total extinction of the civil rights and relations of the party, so that he can neither *take* nor *hold* property, and his heirs succeed to his estate in the same manner as if he were really dead, or the estate is forfeited to the crown; 2. Where there is an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate to the crown. Of the first kind, are the cases of monks professed, and abjuration of the realm; all the other cases are of the second kind. Strictly speaking there are but *two* cases of civil death; those of a *monk professed*, and an abjuration of the realm."

The bankrupt here was not in either class. One against whom a petition in bankruptcy has been filed, and against whom adjudication has been had, is not under any disability of any kind or character, except that his right to deal with the property owned at the time of the filing of the petition is in some ways restricted. He is under no civil disability

whatever. Even as to his property that passes to the trustee by operation of law upon adjudication as of the time of filing the petition he still may deal with it in certain ways. He has the power either before or after adjudication to contract with his creditors for a composition, (*Nassau Smelting & Refining Works vs. Brightwood Bronze Foundry Co.*, —— U. S. —— (opinion filed May 26, 1924), and such dealing is a matter of common and almost daily practice. In all cases, upon confirmation of composition, either before or after adjudication, the property that passes by operation of law to his trustee, again, by operation of law, passes from the trustee to him. (Sec. 70f Bankruptcy Act.) In most states, a bankrupt has exemptions, sometimes returnable to him in personal property, sometimes out of the real estate as a homestead. If a bankrupt is in any sense *civiliter mortuus*, he is not so in any such sense as would contribute or give effect to any section of the Indiana statute cited. Counsel say that cases construing Section 70a have uniformly held that the title of the trustee vests as of the date of adjudication, and that the wife's inchoate interests vest in her at the same time. No cases are cited. A wife's inchoate rights vest upon marriage or when the property is acquired after marriage. Unless there is some provision of some Indiana statute that operates to change the widow's inchoate right and increase it to a present fixed right, upon adjudication against the husband in bankruptcy, then there is not at the time of the vesting of the husband's estate in the trustee any change whatever in the wife's rights. The purpose of Section 70a is not to affect or change the wife's interest. Quite the contrary is true. It simply leaves a wife's interest where it finds it. In *Porter vs. Lazear*, 109 U. S. 84, 86, the court cites English authorities, and says:

> "By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him."

In *Davis vs. Kelly*, decided by the Supreme Court of Indiana, February 2, 1912, and reported in 97 N. E. at page 336, discussing Section 3062 Burns Ann. Statute, a section of the judicial sales act of 1875, said (p. 337):

"A proper construction of the act of 1875, as applied to the facts of the present case, requires the determination of the law prior to its passage. Under the statutes of 1852, a wife's inchoate interest in the real estate of her husband might become absolute in two ways: (1) Where a husband dies seized of real estate, the widow took by descent, as her husband's heir, under section 17 of the statute of descents, being section 2483 R. S. 1881. (Sec. 3014, Burns, 1908). (2) Where the husband's title was divested during coverture the wife not joining in any conveyance, the wife took, upon surviving her husband, not by descent, but by virtue of her marital rights, under section 27 of the statute of descents, being section 3029 Burns 1908 (Section 2491, R. S. 1881). * * *

"It is evident that, when a husband's land was sold at judicial sale prior to the taking effect of said act of 1875, and the husband subsequently died, leaving his wife surviving him, the wife took title in fee simple, not by descent, but by virtue of her marital rights under said section 27" (Section 3029 Burns). "* * Prior to that time, where a husband's land was sold at judicial sale, the inchoate interest of the wife did not become absolute until the husband died, leaving the wife surviving him. During the husband's lifetime the entire title, together with the right of possession, was vested in the purhcaser at the judicial sale. If the wife died during the husband's lifetime, her inchoate right was defeated altogether, and the title of the purchaser at the judicial sale became absolute. The purpose of the act of 1875 was to alter these rules of law by providing that the wife's interest should become absolute without reference to her survivorship of her husband. (Citing cases). The evident purpose of said act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in cases of judicial sales. To this extent and for this purpose the previous law was changed.

* * As the inchoate interest of the wife in the land of her husband in the conveyance of which she did not join vested in her and became absolute on the death

of her husband prior to the taking effect of said act of 1875, under said section 27 of the statute of descents * it follows that under said act of 1875 the inchoate interest of the wife in her husband's land sold at judicial sale vests and becomes absolute under said section 27, supra, upon the consummation of such sale."

It seems clear from this decision that in so far as the Indiana statutes are here involved, the Indiana law, except as changed by the act of 1875, under which respondent here is claiming no rights, is exactly as it was prior to said act. Sections 27 and 17, referred to in the above case, are Sections 3029 and 3014 Burns, respectively, here relied on by respondent. Section 27 has reference to the rights of a "surviving wife." Section 17 disposes of the interests of the wife "if a husband die testate or intestate." There is nothing in any of the four sections, 3037, 3029, 3014 or 2864, that in the remotest degree discloses any intent on any account to hasten or advance the time when the inchoate rights of the wife shall become absolute.

A very diligent search of the Indiana authorities has failed to reveal to us any case in which the courts of Indiana have held that the wife's inchate interest has been advanced so as to become absolute prior to the husband's death, unless such cases have been based and bottomed upon the act of 1875. *Lawson vs. DeBolt*, 78 Ind. 563; *Wright vs. Gelvin*, 85 Ind. 128; *Chase vs. Van Meter*, 140 Ind. 321. And the same search has revealed to us many cases in which the Supreme Court of Indiana has held that the interest of the wife is conditional, depending upon her survivorship. *Fry vs. Hare*, 166 Ind. 415, 420.

We are of opinion that on the death of the widow all her right in this property was extinguished, and that no interest in the property passed to Taylor, her trustee.

The order of the District Court should be, and it hereby is, reversed, and the cause remanded for further proceedings in conformity herewith.

In conclusion may respondent say that the petitioners' have cited no authority upon which they base their right to a writ of certiorari, and in the brief space of time which he has had to prepare this reply, respondent's counsel has searched the decisions of the Supreme Court as carefully as possible and has not been able to find a single case where procedure or practice only was involved which was brought before the United States Supreme Court on writ of certiorari to the Circuit Court of Appeals. All of the cases examined, in which the Supreme Court issued a writ of certiorari, were cases of a great importance and where the merits involved were such that the Supreme Court thought that substantial justice could only be done by the issuance of the writ.

The case at bar involves a comparaticely small sum of money, is of no great importance, involves merely the construction of the statutes in Indiana relating to the inchoate interest of a wife, and is not in any respect a proper one to be brought before the United States Supreme Court on a writ of certiorari from a court whose judgment is final.

The petitioners say in their brief that one of the reasons relied upon by them for the allowance of the writ is that Section 4 of the Act of September 6, 1916, is only intended to be corrective as to mistakes made in the procedures named under the judicial code, and that said section cannot by implication or judicial construction be applied to proceedings under the bankruptcy act. Possibly the petitioners have overlooked the fact that the section of the statute upon which they rely for a granting of the writ prayed for is section 3 of the Act of September 6, 1916, and they are now claiming section 4 of the same act cannot be availed of by respondent in the same proceeding.

Section 3 of the Act of September 6, 1916, amends section 4 of "an act to amend an act entitled " 'an act to codify, revise and amend the laws relating to the judiciary' approved March 3, 1911", approved January 28, 1915, and provides that judgments and decrees of the Circuit Court of Appeals in all proceedings and causes arising under "an act to establish a uniform system of bankruptcy throughout the United States', Approved July 1, 1898, and that all controvercies arising in such proceedings and causes shall be final

save only that it shall be competent for the Supreme Court to require by certiorari, that the proceeding, case or controversy be certified to it for review and determination.

That section specifically refers to the bankruptcy act of 1898 and specifically amends the act of January 28, 1915, which also referred specially to the bankruptcy act.

Then as to section 4 of the Act of September 6, 1916, we believe inasmuch as both sections were passed at the same time and part of the same act, that section 3 mentioning the bankruptcy act that it may be implied and construed that section 4 of the act was passed to meet the same situation and to further the same purpose as the preceeding section, and that therefore the Circuit Court of Appeals was not in error in construing said section to apply to proceedings under the bankruptcy act.

We respectfully submit this brief in opposition to the petition for writ of certiorari and pray that said writ be denied.

JAMES T. WALKER,
HENRY B. WALKER,
Counsel for Respondent.

Office Supreme Court, U.
FILED
JAN 23 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, Wilbur Erskine,

Petitioners,

vs.

Harry W. Voss, Trustee in Bankruptcy of Wilbur Erskine,

Respondent.

No. 199

BRIEF OF RESPONDENTS.

JAMES T. WALKER,
HENRY B. WALKER,
Counsel for Respondents.

INDEX

Page

Statement of Case 1
Argument 3
Opinion of Circuit Court of Appeals 12

ACTS AND CASES CITED

Acretelli, In re, 173 Fed. 121, 21 ABR 537 6
Act of Feb. 13, 1925, Fed. Stat. Anno. P. Supp., April, 1925, p. 91 7
Act of Feb. 13, 1911, 36 Stat. L. 901 9
Act of Feb. 26, 1919, 40 Stat. L. 1181 .....10, 11
Act of Sept. 6, 1916, 39 Stat. L. Sec. 1549a U. S. Comp. St. 1916 .....6, 7, 8, 11, 14
Act of Sept. 24, 1789, 1 Stat. L. 91 .....10, 11
Acts of 1875, p. 178, Sects. 3052-3055 Burns R. S. 1914 .....3, 4, 5, 16, 19, 20
Ana Maria S. Co. v. Quinones, 253 U. S. 257, 41 S. Ct. 110 9
Bank v. Sherman, 101 U. S. 403 16
Breyer Ptg. Co. In re, 216 Fed. 878 .....13, 14
Burr Mfg. Co., In re, 215 Fed. 898, 132 C. C. A. 238 10
Chase v. Van Meter, 140 Ind. 321 .....4, 21
Coder v. Arts, 213 U. S. 223 13
Cutting v. Van Fleet, 252 Fed. 100 9
Davis v. Kelly, 179 Ind. 13, 93 N. E. 336 .....4, 19
Dayton C. & I. Co., In re, 291 Fed. 390 17
Esgee Co. v. U. S., 262 U. S. 151, 43 S. Ct. 154 .. 8
Fry v. Hare, 166 Ind. 415 .....3, 21

Gauzon v. Compania Fen. etc., 245 U. S. 86, 38 S. Ct. 46 8
Goldstein, In re, 216 Fed. 887 14
Hersey, In re, 1 Fed. (2nd) 5 11
Hickling v. Sherman, 101 U. S. 403 16
Howard v. Leete, 257 Fed. 918 9
Kelly v. Minor, 252 Fed. 115 5
Lawson v. Debolt, 73 Ind. 563 ..... 4, 21
Loving, In re, 222 U. S. 183, 56 L. ed. 725 8
Mattill v. Bass, 89 Ind. 220 4
Nassau S&R Wks. v. Brightwood Bronze Fdy. Co., U. S. 18
Ohio Farmers Ins. Co. v. Bevis, 18 Ind. App. 17 .. 6
Petronia, In re, 220 Fed. 269 14
Platner v. Sherwood, 6 Johns. Ch. (N. Y.), 118 .. 17
Porter v. Lazear, 109 U. S. 84 19
Roberts v. Shroyer, 68 Ind. 64 4
Slack, In re, 111 Fed. 523, 7 ABR 121 6
Solu v. Scintron, etc., 237 Fed. 61 7
Sucesores etc. v. Costa, 281 Fed. 439 9
Swiftwater Co. v. Davis, 287 Fed. 813 9
Thomas v. Woods, 173 Fed. 585, 19 Ann. Cas. 1080 5
Toyotisen Kaisha v. Hartmann, 253 Fed. 422 9
Wilson v. Union T. Co., 265 265 Fed. 669 9
Wright v. Gelvin, 85 Ind. 128 ..... 4, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, Wilbur Erskine,

Petitioners,

vs.

Harry W. Voss, Trustee in Bankruptcy of Wilbur Erskine,

Respondent.

No. 199

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Inasmuch as petitioners have not filed a brief in this cause, we will give the court a brief statement of the case.

At the time of the bankruptcy of Wilbur Erskine, he owned real estate in excess of Twenty Thousand Dollars ($20,000.00); his wife, Mary E. Erskine was alive and living with her husband. Wilbur Erskine was adjudicated a bankrupt on the 20th day of December, 1920, in the United States District Court for the District of Indiana, he being at that time a resident of Evansville, Vanderburgh County, Indiana. Subsequently, on the 25th day of February, 1921, the respondent, Harry W. Voss, was duly elected and qualified as

Trustee in Bankruptcy of the said Wilbur Erskine and entered upon his duties as such Trustee and is still such Trustee in Bankruptcy.

Shortly thereafter, on March 21, 1921, the wife of Wilbur Erskine, Mary E. Erskine, died testate. By her will (Tr. pp. 6 to 9) she left all of her estate, real and personal, in trust to the respondent herein, Harold Taylor, as Trustee. Subsequent to the death of Mary E. Erskine, Harry W. Voss, Trustee in Bankruptcy, filed his petition claiming the entire interest in the real estate of the bankrupt, free from any claims of the Trustee of the deceased wife or the bankrupt (Tr. pp. 22 to 23); and thereafter, a written agreement was entered into between said Trustee in Bankruptcy and said Trustee under the will of Mary E. Erskine, and the bankrupt, providing that all parties would join in deeds of conveyance and that the Trustee in Bankruptcy would retain not less than one-fifth of the proceeds of the sales in his hands, subject to the final decision of the court as to whom would be entitled to said monies, and without prejudice to the rights of any of the parties (Tr. pp. 10 to 11).

Thereafter, the petitoners appeared in the bankruptcy court and filed their answers to the petition of the Trustee in Bankruptcy (Tr. pp. 23 to 25). On March 14, 1923, the Referee in Bankruptcy made his finding and rendered judgment in favor of the petitioner, Taylor, in the sum of Seventy-three hundred seventy-four dollars ($7374.00) and ordered the Trustee in bankruptcy to pay to the Trustee under the will that sum, representing one-fifth of the proceeds of the sale of the real estate sold by the Trustee in Bankruptcy pursuant to the agreement heretofore referred to. The Trustee in Bankruptcy, then filed with the Referee in Bankruptcy, his petition to review and revise the order of the Referee which petition the Referee certified to the District Court. (Tr. pp. 11 to 14). An April 24, 1923, the United States District Court for the Dis-

trict of Indiana denied the petition to review and approved the findings and order of the Referee in Bankruptcy. (Tr. p. 14). On June 18, 1923, the said Trustee in Bankruptcy filed in the United States Circuit Court of Appeals for Seventh Circuit his original petition to review and revise the said order of the District Court. (Tr. pp. 1 to 14).

On July 7, 1923, the petitioner herein filed a motion to dismiss the petition to review and revise (Tr. pp. 15 to 17) and on September 11, 1923, on motion of counsel for Trustee in Bankruptcy, the Circuit Court of Appeals ordered that certified copies of certain parts of the record in said cause be filed and made a part of the petition to review and revise. (Tr. p. 29). Subsequently, on June 20th, 1924, the Circuit Court of Appeals refused to dismiss the petition to review and revise of the Trustee in Bankruptcy and reversed the District Court. (Opinion of C. C. A. Tr. pp. 32 to 40 inclusive). On August 8th, 1924, the petitioners filed their petition for re-hearing. (Tr. pp. 42 to 45 inclusive) which on August 15th, 1924, was denied by the Circuit Court of Appeals. Thereafter, on November 10, 1924, a petition for certiorari was filed in the Supreme Court of the United States which was granted on March 2, 1925.

The question involved in this controversy is whether or not upon the adjudication of bankruptcy of Wilbur Erskine, the statutory interest of the wife of Wilbur Erskine at that time vested in his wife. The position of the Trustee in Bankruptcy is, in the first place, that the interest of the wife in her husband's real estate under the laws of the State of Indiana is conditional and depends upon her surviving her husband.

Fry vs. Hare, 166 Ind. 415, 420.

The only exception to this rule is in cases of judicial sales and then the act of 1875 (Sec. 3052 to 3055 inc. Burns Rev. Ind. St. of 1914) applies.

Chase vs. Van Meter, 140 Ind. 321.

Wright vs. Gelvin, 85 Ind. 128.

Lawson vs. DeBolt, 78 Ind. 563, 564.

Davis vs. Kelly, 179 Ind. 13, 97 N. E. 336.

In the case of *Davis vs. Kelly*, 179 Ind. 13, the court said: "The evident purpose of the Act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute."

In the case of *Lawson vs. DeBolt*, 78 Ind. 563, the husband made a voluntary assignment and the assignee sold the debtor's real estate. The court said in that case that "The sale by the assignee and confirmation by the court was a judicial sale." The court did not say that the assignment by the debtor was judicial sale.

And the same is true in the cases of bankruptcy prior to the Act of 1898. These cases decide that the adjudication in bankruptcy together with the transfer or conveyance by the Registrar in Bankruptcy to the Assignee in Bankruptcy was a judicial sale. These cases do not hold that the adjudication itself was a judicial sale.

Roberts vs. Shroyer, 68 Ind. 64.

Mattill vs. Bass, 89 Ind. 220.

The only way in which a bankrupt's wife's inchoate interest may be hastened is by judicial sale.

The Statutes of Indiana, Sections, 3052-3055 Burns' Revised Stat. of 1924, provide that if the husband's real estate is sold upon a judicial sale, the inchoate interest of the wife in the real estate sold shall become a vested interest in her without waiting for the death of the husband. Under the Bankruptcy Act, prior to the Act of 1898, the real estate of the bankrupt,

passed to the "Register" in Bankruptcy and he entered an order that it should be conveyed to the assignee and he thereupon executed a deed conveying the same to the "assignee" in bankruptcy to be administered as part of the Bankrupt's estate. This conveyance by the Register under the Bankruptcy Act has been held to be a judicial sale.

Under the Bankruptcy Act of 1898, the real estate of the Bankrupt passes to the Trustee "by operation of law" and no conveyance is made. The distinction seems as clear as would exist between a conveyance of real estate by an officer of Court made in compliance with a court's order and the passing of real estate "by operation of the law" of descent.

The petitioners herein have repudiated by their brief in the Circuit Court of Appeals and, as shown by the opinion of the Circuit Court of Appeals, any right which they might have acquired by virtue of the Judicial Sales Act of 1875. It is our opinion that there could be no judicial sale under the provisions of the Judicial Sales Act of 1875 until the actual Trustee's sale by order of the bankruptcy court at which time the bankrupt's wife would be entitled to have her inchoate interest set off to her.

In some jurisdictions and in Indiana, but for the Judicial Sales Act, it is possible for the Trustee in Bankruptcy to sell the real estate of the bankrupt, subject to the wife's inchoate interest.

It has been held that the inchoate right or dower is unimpaired by bankruptcy; and the Trustee in Bankruptcy takes the property of the bankrupt subject to the right of the widow to dower becoming consummate through the bankrupt's death.

Kelly vs. Miner, 252 Fed. 115.

Thomas vs. Woods, 173 Fed. 585, 19 Ann. Cases, 1080.

In Re Slack, 111 Fed. 523, 7 A. B. R., 121.

In Re Acretelli, 173 Fed. 121, 21 A. B. R., 537.

If such inchoate interest of the wife can never become consummate because of the wife's death prior to the death of the husband, it seems that the Trustee in Bankruptcy should be able to convey an absolute title to entire interest in the real estate of the bankrupt, just as the bankrupt himself before bankruptcy could have done in case the wife had not joined in the conveyance and subsequently died before his death.

Ohio Farmers Insurance Co. vs. Bevis, 18 Ind. App. 17.

Therefore, it is urged that the Trustee in Bankruptcy is entitled to the entire proceeds of the sale of such real estate.

The Petitioner has suggested that the Trustee in Bankruptcy did not pursue the proper Appellate Proceedure to take the case from the District Court to the Circuit Court of Appeals so that it would be unnecessary for him to file an appeal bond. As this court knows, the Bankruptcy Act provides that the Trustee in Bankruptcy shall not in any appeal, file his bond.

Emphasis has been laid upon the proposition that the respondent's orginal petition to review and revise to the Circuit Court of Appeals, should have been dismissed, inasmuch as respondent herein failed to follow the proper appellate procedure. Although the court below found that the proper procedure was not followed, respondent here does not concede that point. If counsel for respondent did misconceive the proper appellate procedure, it is urged that this Honorable Court follow the opinion of the Circuit Court of Appeals, below, that Congress, by the Act of September 6, 1916, at Section 4 thereof (39 Stat. L. 727) attempted to remedy such mistakes.

It is urged that the Circuit Court of Appeals properly construed said section which is as follows:

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out. But when such mistake or error occurs it shall disregard the same and take the action hich would be appropriate if the proper appellate procedure had been followed. (Sec. 4 of the Act of September 6, 1916, 39 Stat. L. 727, Sec. 1549a, U. S. Comp. Stats. 1916)."

That this view is firmly fixed in our practice is shown by the fact that this section has been re-enacted in the new code of February 13th, 1925, Section 10 under Section 240 of that act, Federal Statutes Annotated Pamphlet Supplement, April 1925, p. 91.

In the case of *Solu vs. Scintron and Aboy*, 237 Fed. 61, this section was construed and the court said, "In a case where the only difference between the two modes of seeking review is formal and where none of the substantial reasons for distinction between writs of error and appeals exist, we may properly disregard the objection. We will therefore proceed to consider the case on the merits."

The term "petition to review and revise" if added to the above quotation would only carry out the apparent legislative intent.

"This section does not abolish the distinction between writs of error and appeals but only requires that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review."

Gauzon vs. Compania General, etc., (1917) 245 U. S. 86, 38 S. Ct. 46.

In a petition to review and revise, only questions of law may be determined or brought before the Appellate Court. The respondent herein sought by his petition to review and revise nothing additional than a decision of a legal question. If he had proceeded by an appeal or writ of error to the Circuit Court of Appeals, rather than by a petition to review and revise, the question would have been one of law just the same, as nothing else is involved in this case. The matter was before the court on an agreed statement of facts and the entire record was before the court.

In the case cited by petitioners, *In re Loving*, 224 U. S. 183, 56 Law Ed. 725, which was decided in 1912, and prior to the enactment of the section herein involved, the court said in its opinion that the object of Section 24b of the Bankruptcy Act of 1898 is to give a review as to matters of law where facts are not in controversy. Such was the situation in the case at bar.

Furthermore the United States Supreme Court has held in construing Section 4 of the Act of September 6, 1916, that the purpose of said act was to discourage the necessity for abundant caution and to secure economy in the time of the courts and in making up and printing records. Mr. Chief Justice Taft said in the case of *In Esgee Co. vs. U. S.*, (1923) 262 U. S. 151, 43 S. Ct. 154, "Since the passage of the Act of September 6, 1916, which provides that no court having power to review a judgment or decree passed by another court shall dismiss an appeal because a writ should have been sued out, but that when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper Appellate procedure had been followed. The distinction is not important from the standpoint of the jurisdiction of this court. In the interest, however, of or-

derly procedure economy in time of both courts and in the making up and printing of the record, counsel should make every effort to select the proper procedure in review and not duplicate methods, out of abundant caution which the Act of 1916 makes unnecessary."

This section has been repeatedly upheld and in that regard may we cite the following cases:

Sucesores de Pyres Hermanos vs. Costa, (1922), 281 Fed. 439.

Swiftwater Plantations Co. vs. Davis, (1923), 287 Fed. 813.

Toyotisen Kaisha vs. Hartmann, (1918), 253 Fed. 422.

Cutting vs. Van Fleet, (1918), 252 Fed. 100.

Howard vs. Leete, (1919), 257 Fed. 918, 922.

Wilson vs. Union Tool Co., (1920), 265 Fed. 669.

"By reason of Section 4 of the Act of September 6, 1916, Chapter 448, 39 Stat. at Large, 727, Comp. Stat. Sec. 1649A, Fed. Stat. Ann. Supp. 1918, p. 421, this failure to adopt the proper Appellate Procedure is no longer fatal."

The distinction between the various modes of appellate procedure are not abolished by this section, and the rights which an appellant would have under the proper procedure are given him although the procedure itself was improper.

Ana Maria Sugar Co. vs. Quinones, (1920), 253 U. S. 247, 41 S. Ct. 110.

Section 1 of the Act of February 13, 1911, Chap. 47 (36 Stat. L. 901) provides for printed transcripts in cases of appeals or writs of error, although the act referred to mentions only reviews by writ or error or

appeal, *petitions to review under section 24b* of the Bankruptcy Act of 1898 are held to be the equivalent of an appeal for the purposes of this statute.

In re Burr Mfg. Co., 215 Fed. 898, 132 C. C. A. 238.

In construing the words "petition to review and revise" to be included within the terms "writ of error" or "appeal" in one case, a precedent has been set for such a construction of the act now in question.

The Circuit Court of Appeals in the case at bar included the term "petition to review and revise" within the meaning of the terms "writ of error" or "appeal", and it is respectfully urged that it did so properly.

The court's attention is called to other provisions of the United States laws. The first is the Act of September 24, 1789, 1 Stat. L. 91:

"No summons, writ, declaration, return, process, judgment, *or other proceedings in civil causes*, in any court of the United States, shall be abated, arrested, quashed, or reversed *for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect*, or want of form, except those which, in cases of demurer, the party demurring specially sets down, together with his demurer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The second is the Act of February 26, 1919, Chap. 48, 40 Stat. L. 1181, which is an amendment to Section

269 of the Act of March 3, 1911. This section shows the trend of Congress in regard to provisions providing against jeofails. This act reads as follows:

"All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The Act of September 24, 1789, Section 4 of the Act of September 6, 1916, and the Act of February 26, 1919, read together show the decided attitude of Congress toward technicalities in the courts and these statutes show the legislative intention to alleviate in all ways possible the effects of misconceived remedies and technical errors. These sections show, also, that Congress expects the Federal Courts to give substantial justice in every case, and not render decisions which will penalize litigants for technical mistakes made by their counsel.

The bankruptcy texts cite scores of cases where in order to be safe, litigants have sought a review in the Circuit Court of Appeals by appeal and also petitions to review and revise, and many instances are given where the courts indicated that they were in doubt as to which was the proper remedy. On numerous occasions the courts have properly passed upon the merits of the case before them without any question although the method of obtaining jurisdiction for the review is clearly wrong as they have done in

In re Hersey, 1 Fed. 2nd p. 5. (Advance Sheets, Nov. 13, 1924).

which has just come to respondent's attention.

Congress has always sought to obviate the miscarriage of justice to unfortunate litigants who have misconceived their method of seeking a review. Any one of the three Acts of Congress set out in this brief can, if broadly construed, amply justify the decision of the court below. For the convenience of this Honorable Court we set out the opinion of the Circuit Court of Appeals sought to be reviewed here by the writ prayed for. There is no argument which can be made by counsel which may sustain it which is equal to the arguments set out in the opinion itself.

Before Alschuler, Evans and Page, Circuit Judges.
Opinion of Page, Cir. J.

Wilbur Erskine, on December 20, 1921, when adjudicated a bankrupt, was a resident of the state of Indiana, and was married to his first wife, who died March 21, 1922, survived by her husband and two children.

Before the filing of the petition and adjudication, bankrupt owned, in fee simple, a considerable amount of real estate. His wife left a last will and testament, naming respondent Taylor trustee thereunder. Petitioner Voss was elected trustee of the bankrupt estate.

After the death of the wife, who had never joined in any conveyance, the real estate was sold, by stipulation between petitioner, respondent and bankrupt, all parties joining in the deeds.

The rights of respondent, as trustee under the will, were, by agreement of all of the parties, submitted to the court in bankruptcy, and its holding was favorable to the claim of respondent and bankrupt that, upon the filing of the petition and the adjudication in bankruptcy, the wife became vested with the same rights in the estate of the bankrupt that she would have had thereunder had she survived her husband.

This case is brought here by petition to review and revise, and a motion is made to dismiss on the ground that the case should have been brought here by appeal.

In support of his contention that this case is properly before this court on a petition toreview and revise, petitioner's main reliance is upon *Coder vs. Arts*, 213 U. S. 223. Because of the difference between the facts in that case and the case at bar, it is inapplicable here to support petitioner's contention, in that case, a creditor filed his claim, and it was allowed in bankruptcy. In connection therewith, and as a part thereof, he asked for priority, and the court held that the claim for priority was merely incident to the allowance of the claim. In the case at bar, respondent is not a creditor and is not seeking the allowance of a claim, as such. The same thing that respondent and bankrupt are seeking to do is to have carved out and set aside to them, as their property, free from administration in bankruptcy, a very considerable portion of the property which would otherwise be administered in bankruptcy and distributed to creditors.

This court in *re Breyer Printing Co.*, 216 Fed. 878, pointed out so clearly the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings" that it will serve no good purpose to add to what was there said. We there also discussed *Coder vs. Arts, supra*, and other leading cases wherein there is pointed out the distinction between "proceedings in bankrupty" and "controversies at law and in equity arising in the course of bankruptcy proceedings."

> "It seems clear, under the facts in the instant case, that "between the *trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants" (respondents) "on the other, concerning property in the possession of the *trustee* to be litigated in appropriate plenary suits, and not affecting directly administra-

tive orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors."

This is the language *in re Breyer Printing Co., supra.*

Counsel for petitioner rely upon *In re Peronio,* 220 Fed. 269, in which we held that the roceeding in the district court was of a summary nature, citing *In re Goldstein,* 216 Fed. 887,889, and *In re Breyer Printing Co., supra.* In the Goldstein Case, after distinguishing between summary and plenary methods of proceedure, we said:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable.* A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

That was a petition to review and revise, which raised only the question of the jurisdiction of the court to enter any order other than one of dismissal, after it was ascertained that there was a claim to property that was not merely colorable. The Petronio Case is of like character. There the District Court, in the face of the fact that its jurisdiction was disputed, and the further fact that a substantial and not a colorable claim was set up, proceeded to adjudicate the matter in a summary way, and therefore, both the Petronio and Goldstein Cases were reviews of summary orders in bankruptcy.

The other authorities cited by petitioner are in harmony with the authorities here cited.

The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the parties can not affect the method of procedure to procure a review.

For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an act of September 6, 1916 (39 U. S. Stats. at L. p. 727; Sec. 1649a U. S. Compiled Stats. 1916):

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, supra, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with the appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are

lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms "appeal" and "writ of error" should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, especially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal.

Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana judicial sales act of 1875 (Secs. 3052 and 3055, page 178, Burns, 1914), but asserts,

> "That the rights and interests of his decedent (Mary E. Erskine) "in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the state of Indiana, being Sections 3014, 3029, 3037 and 2864, Burns' 1914," (being, respectively, Secs. 17, 27 and 35 of Acts of 1852, regulating descents, and Sec. 122 of the Decedents' Estates Act of 1881, for the settlement and distribution of estates).*

What respondent's argument means by a vesting upon adjudication by operation of law seems to be based upon three things: (a) That under Section 75a (5) of the Bankruptcy Act, the inchoate right of dower of the wife does not pass to the trustee; (b) That upon adjudication 'So far as the bankrupt's property was concerned, after the adjudication, he was, as it were, *civiliter mortuus*. His rights in the property were the same as though he were dead."; (c) That, by reason of *a* and *b*, there was vested absolutely in the constructive widow all of the rights that she would have had as

(a) May be conceded.

In *Bank vs. Sherman and Hickling vs. Sherman*,

101 U. S. 403, relied upon in support of proposition b, dower rights were not involved, but the court, commencing upon the effect of filing petition in bankruptcy, said:

> "The filing of the petition was a *caveat* to all the world. **Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. **If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus*."

We think that what was said *in re Dayton Coal & Iron Co.*, 291 Fed. 390, as to a part of the above quoations is reasonably applicable to all of it. The statement, "The Bankrupt became, as it were, for many purposes, *civiliter mortuus*," we think is said more as an illustration than as a judicial determination, and certainly should not be held to have any influence on the determination of the issue in this case. In *Platner vs. Sherwood*, 6 Johnson's Chancery Reports (N. Y.) 118, 123, it is said:

> "But the *civil death* spoken of in the books, is of two kinds: 1. Where there is a total extinction of the civil rights and relations of the party, so that he can neither *take* nor *hold* property, and his heirs succeed to his estate in the same manner as if he were really dead, or the estate is forfeited to the crown; 2. Where there is an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate to the crown. Of the first kind, are the cases of monks professed, and abjuration of the realm; all the other cases are of the second kind. Strictly speaking there are but *two* cases of civil death; those of a *monk professed*, and an abjuration of the realm."

The bankrupt here was not in either class. One against whom a petition in bankruptcy has been filed, and against whom adjudication has been had, is not under any disability of any kind or character, except that his right to deal with the property owned at the time of the filing of the petition is in some ways restricted. He is under no civil disability whatever. Even as to his property that passes to the trustee by operation of law upon adjudication as of the time of filing the petition he still may deal with it in certain ways. He has the power either before or after adjudication to contract with his creditors for a composition, (*Nassau Smelting & Refining Works vs. Brightwood Bronze Foundry Co.*,—U. S.—(Adv. Opinions Dec. 15, 1924), and such dealing is a matter of common and almost daily practice. In all cases, upon confirmation of composition, either before or after adjudication, the property that passes by operation of law to his trustee, again, by operation of law, passes from the trustee to him. (Sec. 70f Bankruptcy Act.) In most states, a bankrupt has exemptions, sometimes returnable to him in personal property, sometimes out of the real estate as a homestead. If a bankrupt is in any sense *civiliter mortuus*, he is not so in any such sense as would contribute or give effect to any section of the Indiana statute cited. Counsel say that cases construing Section 70a have uniformly held that the title of the trustee vests as of the date of adjudication, and that the wife's inchoate interests vest in her at the same time. No cases are cited. A wife's inchoate rights vest upon marriage or when the property is acquired after marriage. Unless there is some provision of some Indiana statute that operates to change the widow's inchoate right and increase it to a present fixed right, upon adjudication against the husband in bankruptcy, then there is not at the time of the vesting of the husband's estate in the trustee any change whatever in the wife's rights. The purpose of Section 70a is not to affect or change the wife's interest. Quite the contrary is true. It simply leaves a wife's interest

where it finds it. In *Porter vs. Lazear*, 109 U. S. 84, 86, the court cites English authorities, and says:

> "By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him."

In *Davis vs. Kelly*, decided by the Supreme Court of Indiana, February 2, 1912, and reported in 97 N. E. at page 336, discussing Section 3052 Burns Ann. Statute, a section of the judicial sales act of 1875, said (p. 337):

> "A proper construction of the act of 1875, as applied to the facts of the present case, requires the determination of the law prior to its passage. Under the statutes of 1852, a wife's inchoate interest in the real estate of her husband might become absolute in two ways: (1) Where a husband dies seized of real estate, the widow took by descent, as her husband's heir, under section 17 of the statute of descents, being section 2483 R. S. 1881. (Sec. 3014, Burns, 1908). (2) Where the husband's title was divested during coverture the wife not joining in any conveyance, the wife took, upon surviving her husband, not by descent, but by virtue of her marital rights, uder section 27 of the statute of descents, being section 3029 Burns 1908 (Section 2491, R. S. 1881). * * *
>
> "It is evident that, when a husband's land was sold at judicial sale prior to the taking effect of said act of 1875, and the husband subsequently died, leaving his wife surviving him, the wife took title in fee simple, not by descent, but by virtue of her marital rights under said section 27" (Section 3029 Burns). "* * Prior to that time, where a husband's land was sold at judicial sale, the inchoate interest of the wife did not become

absolute until the husband died, leaving the wife surviving him. During the husband's lifetime the entire title, together with the right of possession, was vested in the purchaser at the judicial sale. If the wife died during the husband's lifetime, her inchoate right was defeated altogether, and the title of the purchaser at the judicial sale became absolute. The purpose of the act of 1875 was to alter these rules of law by providing that the wife's interest should become absolute without reference to her survivorship of her husband. (Citing cases). The evident purpose of said act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in cases of judicial sales. To this extent and for this purpose the previous law was changed.

* * As the inchoate interest of the wife in the land of her husband in the conveyance of which she did not join vested in her and became absolute on the death of her husband prior to the taking effect of said act of 1875, under said section 27 of the statute of descents* it follows that under said act of 1875 the inchoate interest of the wife in her husband's land sold at judicial sale vests and becomes absolute under said section 27, supra, upon the consummation of such sale."

It seems clear from this decision that in so far as the Indiana statutes are here involved, the Indiana law, except as changed by the act of 1875, under which respondent here is claiming no rights, is exactly as it was prior to said act. Sections 27 and 17, referred to in the above case, are Sections 3029 and 3014 Burns, respectively, here relied on by respondent. Section 27 has reference to the rights of a "surviving wife." Section 17 disposes of the interests of the wife "if a husband die testate or intestate." There is nothing in any of the four sections, 3037, 3029, 3014 or 2864, that in the remotest degree discloses any intent on any

account to hasten or advance the time when the inchoate rights of the wife shall become absolute.

A very diligent search of the Indiana authorities has failed to reveal to us any case in which the courts of Indiana have held that the wife's inchoate interest has been advanced so as to become absolute prior to the husband's death, unless such cases have been based and bottomed upon the act of 1875. *Lawon vs. DeBolt*, 78 Ind. 563; *Wright vs. Gelvin*, 85 Ind. 128; *Chase vs. Van Meter*, 140 Ind. 321. And the same search has revealed to us many cases in which the Supreme Court of Indiana has held that the interest of the wife is conditional, depending upon her survivorship. *Fry vs. Hare*, 166 Ind. 415, 420.

We are of opinion that on the death of the widow all her right in this property was extinguished, and that no interest in the property passed to Taylor, her trustee.

The order of the District Court should be, and it hereby is, reversed, and the cause remanded for further proceedings in conformity herewith."

We respectfully submit this brief and pray that the judgment of the Circuit Court of Appeals be in all things affirmed.

JAMES T. WALKER,

HENRY B. WALKER.

Attorneys for Respondents.

Taylor, Trustee vs. Voss.

No. 199.

ADDITIONAL AUTHORITIES SUBMITTED BY RESPONDENT.

The Petition to Review and Revise was the proper method of seeking review. Re. Rouse Hazard Co. 91 Fed. 96. Re Richards. 96 Fed. 936. Brady vs. McCann. 8 Fed. (2nd Ed) 995.

The inchoate right of dower should be treated as a lien or incumbrance. 19 Corpus Juris, 494 and cases there cited.

Even though the improper method of seeking review is taken the Court can consider the merits. Bryan vs. Bernheimer. 181 U. S. 188. Holden vs. Stratton, 191 U. S. 115. In re Pacific Co-op. League Stores. 291 Fed. 759. Courier Journal Ptg. Co. vs. Schaefer Meyer Brewing Co. 101 Fed. 699.

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D.C.